Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2004

HAROLD E. CARTER, WARDEN
Petitioner,

-vs-

DAVID B. CLINKSCALE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state criminal defendant exhausts a claim of trial counsel ineffectiveness when he raises that claim in his direct state appeal but the state appellate court, consistent with this Court's reasoning in *Massaro v. United States*, 538 U.S. 500 (2003), declines to rule on the claim because the appellate record is inadequate to allow a ruling on that claim.

2. Whether the state courts have sufficiently complied with the clear-and-express statement rule set forth in *Harris v. Reed*, 489 U.S. 255 (1989), when a state trial court denies a motion to excuse the procedural default, when the state appellate court affirms that denial, and when the federal appellate court concedes that the state courts did not reach the merits of the federal claim.

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Petitioner Harold E. Carter, Warden, hereby respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit, which awarded habeas relief to respondent.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at *Clinkscale v. Carter*, 375 F.3d 430 (6th Cir. 2004). (See Appendix A) The Sixth Circuit's order denying rehearing is reported at 2004 U.S. App. Lexis 20699. (See Appendix D)

The district court's order and judgment are unreported. (See Appendix B) The magistrate's report and recommendation is also unreported. (See Appendix C)

These federal habeas rulings were based upon review of state appellate court rulings. The opinion of Ohio Court of Appeals, Tenth Appellate District, which affirmed respondent's convictions upon direct appeal is reported at 1999 Ohio App. Lexis 6453, 2000 WL 775607. The Ohio Supreme Court's order declining discretionary review can be found at *State v. Clinkscale*, 88 Ohio St. 3d 1482, 727 N.E.2d 1327 (2000).

The Ohio trial court later denied respondent's motion for leave to file a motion for new trial in an unreported decision. The Court of Appeals affirmed the denial of that motion in an unreported memorandum decision. The Ohio Supreme Court declined discretionary review at *State v. Clinkscale*, 93 Ohio St.3d 1497, 758 N.E.2d 1148 (2001).

JURISDICTIONAL STATEMENT

Review is sought of the opinion decided and judgment filed by the Sixth Circuit on July 8, 2004. After timely extension, petitioner filed a timely petition for rehearing and suggestion for rehearing en banc on July 29, 2004, which the

Sixth Circuit denied by order filed on September 17, 2004. This petition for writ of certiorari was timely filed within ninety days of the latter date.

Section 1254(1) of Title 28 of the United States Code confers jurisdiction on this Court to review the Sixth Circuit opinion and judgment.

STATUTORY PROVISIONS INVOLVED

Section 2254(b)(1) of Title 28 of the United States Code provides, in relevant part, as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
> (A)the applicant has exhausted the remedies available in the courts of the State; * * *

INTRODUCTION

Respondent Clinkscale has claimed that his two trial counsel were ineffective in failing to file a timely notice of alibi in the Ohio trial court. This untimeliness led the trial court to exclude the "alibi" evidence, and Clinkscale was convicted. Clinkscale raised the alibi/ineffectiveness claim on direct appeal, but the Ohio appellate court declined to rule on the issue, concluding that the appellate record was inadequate to allow a ruling. The Ohio Supreme Court thereafter declined discretionary review.

Despite the Ohio appellate court's ruling that the appellate record was inadequate, the Sixth Circuit majority

determined that presentation of the alibi/ineffectiveness claim in the direct appeal was enough to exhaust state court remedies. According to the Sixth Circuit majority, the alibi/ineffectiveness claim was exhausted because "Clinkscale raised his * * * claim on direct appeal, in which there were no special limitations on the ability of the Ohio Court of Appeals to reach the merits of that claim." *Clinkscale v. Carter*, 375 F.3d at 440. "Clinkscale could have asserted his ineffective assistance claim in a habeas petition filed in federal court as soon as the Ohio Supreme Court dismissed his petition for review of the Ohio Court of Appeals' denial of relief on direct appeal." *Id.* at 441.

The Sixth Circuit's ruling contradicts the reasoning behind this Court's decision just last year in *Massaro v. United States*, 538 U.S. 500 (2003). *Massaro* and other cases recognize that direct appeal is *rarely* an appropriate forum to litigate claims of trial counsel ineffectiveness. Indeed, the Sixth Circuit majority implicitly confirmed this very point elsewhere in its opinion. When the majority reached the merits of the alibi/ineffectiveness claim, it relied on *post-appeal* affidavits and *post-appeal* documentary evidence that had not been available to the state appellate courts in the direct appeal.

The Sixth Circuit majority opinion has done and will do serious injury to the interests of federal-state comity that underlay the exhaustion doctrine. "The exhaustion requirement serves AEDPA's goal of promoting comity, finality, and federalism, by giving state courts the first opportunity to review the claim, and to correct any constitutional violation in the first instance." *Carey v. Saffold*, 536 U.S. 214, 220 (2002) (internal quotation marks,

brackets, and citation omitted). But mere presentation of a claim to the state courts is not enough. There must be "fair presentation" of the issue in the state courts such that the state courts have a fair opportunity to rule on the issue. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999).

Presenting a claim in the wrong procedural context does not constitute "fair presentation" for exhaustion purposes. *Castille v. Peoples*, 489 U.S. 346, 351 (1989). The purposes behind the exhaustion requirement would be "frustrated were we to allow federal review to a prisoner who had *presented* his claim to the state court, but in such a manner that the state court could not, consistent with its own procedural rules, have entertained it." *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000).

Under the Sixth Circuit's flawed logic, however, criminal defendants in the states comprising the Sixth Circuit will be allowed to "exhaust" by presenting their ineffectiveness claims in the inappropriate forum of a direct appeal, and the courts of these states will not be given a fair opportunity to address those claims before the case proceeds to federal habeas review. Since most post-conviction and federal habeas claims revolve around issues of trial counsel ineffectiveness, the Sixth Circuit decision will "unjustifiably undercut the considerations of federal-state comity that the exhaustion requirement seeks to promote." *Baldwin v. Reese*, 541 U.S. 27, 124 S.Ct. 1347, 1351 (2004).

The Sixth Circuit decision also threatens federal-state comity because it amounts to "do as I say, not as I do." Relying on *Massaro*, the Sixth Circuit has correctly continued its practice of declining as a general matter to rule

on trial counsel ineffectiveness claims, thereby requiring such claims to proceed through federal post-conviction review. But when the Ohio appellate court used this very same approach, the Sixth Circuit penalized Ohio by concluding that state post-conviction review was not even necessary.

Beyond *Massaro*, a conflict exists between the Sixth Circuit's decision and the decisions of other federal habeas courts that have faced the same issue when state appellate courts decline to rule on ineffectiveness claims. Contrary to the Sixth Circuit's decision here, these courts have concluded that presentation of the claim in the direct appeal was not enough to exhaust and that the habeas petitioner must pursue state post-conviction review in order to exhaust. See Argument, Part I, at pp. 20-23, *infra*.

As an alternative ground for "exhaustion," Clinkscale will contend that he exhausted the alibi/ineffectiveness claim in later post-appeal state-court proceedings. In fact, the Sixth Circuit majority erred in this respect as well. Clinkscale demonstrated in the subsequent state-court proceedings that his claim was procedurally defaulted in those proceedings. Clinkscale filed a motion for leave to file an untimely motion for new trial, but the state trial court declined to excuse the untimeliness, thereby clearly and expressly enforcing the time bar. The state appellate court thereafter affirmed, thereby again clearly and expressly enforcing the procedural default. Even if the clear-and-express-statement rule applied, it was satisfied. See Argument, Part II, *infra*.

Because the Franklin County Prosecutor and Assistant Prosecutor believe that these issues, particularly the

first, carry such importance regarding the proper scope of state criminal appeals, they are filing the present petition for writ of certiorari after having obtained appointments as special counsel from the Ohio Attorney General.

STATEMENT OF THE CASE

Convicted on aggravated murder and other charges in October 1998, respondent Clinkscale claimed on direct appeal that his trial attorneys had been ineffective in filing an untimely notice of alibi, which resulted in the exclusion of "alibi" witnesses. In affirming defendant's convictions in December 1999, the Ohio Court of Appeals declined to rule on the issue, finding that the appellate record was inadequate for that purpose.

> In his third claim, defendant maintains that counsel were ineffective for not timely filing defendant's notice of alibi. As noted, counsel did clearly indicate that they were aware of the alibi witnesses before the disclosure deadline set forth in Crim.R. 12.1; however, *the record contains no explanation of the reason behind the late disclosure.* For example, the record does not disclose whether trial counsel failed to investigate or to interview defendant's alleged alibi witnesses. As a result, we are unable to reach a determination as to whether the delay was the result of trial strategy or was due to counsel's ineffectiveness as alleged. As *the reason for the late disclosure is not a part of the record* before this court, defendant must pursue his claim of ineffective assistance based upon the late disclosure *by way of a motion for postconviction relief.* (Emphasis added)

The Ohio Supreme Court declined discretionary review in April 2000. *State v. Clinkscale*, 88 Ohio St.3d 1482, 727 N.E.2d 1327 (2000).

Over ten months after the Ohio Court of Appeals advised respondent to pursue post-conviction relief, the defense in October 2000 filed a "motion for leave to file motion for new trial" pursuant to Oh.Crim.R. 33(B). The defense attached affidavits from the two trial attorneys, but neither of the trial attorneys conceded ineffectiveness, and one of the attorneys said that the "defense team made a strategic decision not to file a Notice of Alibi until we were sure that we could back it up with credible witnesses and corroboration."

Also attached to the motion for leave was the affidavit of a defense investigator regarding his investigation into the alibi and a copy of his investigative report dated October 3, 1998, which provided details of interviews with two "alibi" witnesses, Rhonda Clark and Bryan Fortner. The report also provided the details of an interview with Arthur Clinkscale, the defendant's father. The defense did not provide any affidavit from Clark or Fortner but did provide an affidavit from the father Clinkscale, whose claim that his son came home in Youngstown at around 5:45 a.m. or 6:00 a.m. could not provide an alibi to his son for the Columbus homicide occurring at approximately 3:45 a.m.

There are time limits for filing a motion for new trial in Ohio. Except for motions for new trial based on newly discovered evidence, a motion for new trial must be filed within fourteen days of the verdict(s). Oh.Crim.R. 33(B). Despite the 14-day time limit, Oh.Crim.R. 33(B) allows the

defendant to file a motion for leave to file a motion for new trial. Such motions involve a two-step process. In the first step, the trial court determines whether the defendant has shown by clear and convincing proof that the defendant was unavoidably prevented from filing the motion in a timely manner. If so, the trial court can grant the motion for leave, thereby excusing the untimeliness. Upon the granting of leave, the defendant must file his motion for new trial within seven days. *State v. Walden*, 19 Ohio App.3d 141, 146, 483 N.E.2d 859, 865 (1984).

In the present case, Clinkscale claimed unavoidable prevention because the trial attorneys could not be expected to argue their own ineffectiveness and because, although a new counsel had been appointed for the direct appeal, no counsel had been specially appointed to file a new-trial motion or post-conviction petition.

In December 2000, the Ohio trial court denied the motion for leave by noting that the motion for leave was "grossly out of rule" because it was filed over two years after the verdicts. The court further noted that "Defendant makes a naked assertion that he was unavoidably prevented from filing on time but offers no evidence to support such allegation." The court rejected defendant's argument that unavoidable prevention could be shown by lack of appointment of special counsel.

The trial court went on to say "a motion for a new trial is not intended to be a device used to second guess the appeals court." The trial court said it would be overruling itself and the Court of Appeals to grant leave.

Clinkscale appealed to the Ohio Court of Appeals, which, in a decision rendered in September 2001, affirmed the trial court's denial of the motion for leave to file an untimely motion for new trial. After quoting Oh.Crim.R 33(B), the court noted that defendant was required to show "unavoidable prevention" by clear and convincing proof. Relying on the 1984 appellate decision in *Walden*, the appellate court noted that "[a] party is unavoidably prevented from filing a motion for new trial if the party had no knowledge of the existence of the ground supporting the motion for new trial and could not have learned of the existence of that ground within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence."

Applying that definition of "unavoidable prevention," the Court of Appeals rejected Clinkscale's first assignment of error, which had challenged the trial court's denial of the motion for leave and/or the trial court's failure to hold an evidentiary hearing on the motion for leave.

> Here, the grounds underlying appellant's motion for new trial were known at the time the verdict was rendered. Moreover, as appellant concedes, these issues were already raised by appellant on direct appeal. As such, there was nothing to be resolved by an evidentiary hearing, and the trial court did not err in denying appellant's motion without such a hearing. Appellant's first assignment of error is overruled.

Clinkscale's second assignment of error raised various ineffective trial counsel claims, including the claim that counsel had been ineffective regarding the notice of alibi. The

Court of Appeals rejected that assignment of error as well, citing its resolution of the first assignment of error:

> In his second assignment of error, appellant raises a claim of ineffective assistance of trial counsel. Appellant concedes that these issues were previously raised on direct appeal, but purports to raise them again for purposes of preserving them for federal court review. Given appellant's concession in this regard and our resolution of appellant's first assignment of error, appellant's second assignment of error is not well-taken and is overruled.

The Ohio Supreme Court declined discretionary review in December 2001. *State v. Clinkscale*, 93 Ohio St.3d 1497, 758 N.E.2d 1148 (2001).

Meanwhile, Clinkscale had filed a federal habeas petition in April 2001 under 28 U.S.C. § 2254, raising the alibi/ineffectiveness claim and other claims. The warden's answer/return of writ contended that the alibi/ineffectiveness issue was procedurally defaulted because the Ohio Court of Appeals had correctly declined to rule on the issue on direct appeal and because Clinkscale had only sought state-court relief thereafter through a motion for leave to file a motion for new trial, which, the warden noted, was "egregiously late" and was denied for an "obvious procedural deficiency."

The magistrate issued a report and recommendation in June 2002, recommending that the habeas petition be denied. The magistrate disagreed with the warden's procedural default argument, but only on the narrow basis that the magistrate thought another procedural mechanism remained open to

Clinkscale, *i.e.*, a post-conviction petition under Ohio Revised Code Section 2953.21. Report and Recommendation, at 23-25. The magistrate conceded that there was only a "remote possibility" that the Ohio courts would entertain such an untimely petition. Nevertheless, the magistrate concluded that "Ohio law does not clearly foreclose consideration of a post-conviction petition" and that Clinkscale "still has a remedy in state court" if he files a post-conviction petition.

The magistrate rejected Clinkscale's claim that the alibi/ineffectiveness issue had been exhausted through the direct appeal. "The Ohio court of appeals stated in petitioner's direct appeal that this claim should be raised in a post-conviction petition. This court will not second guess the state court of appeal's decision that petitioner must pursue this claim in a post-conviction petition." Report and Recommendation, at 25 n. 2.

Notwithstanding the lack-of-exhaustion conclusion, the magistrate invoked 28 U.S.C. § 2254(b)(2) to reach the merits of the alibi/ineffectiveness claim. Section 2254(b)(2) allows a federal habeas court to *deny* a claim on the merits, notwithstanding the lack of exhaustion. Addressing the merits, the magistrate rejected the alibi/ineffectiveness claim, citing several concerns, including his view that the evidence would not have created a reasonable probability of a different outcome. *Id.* at 25-30.

Clinkscale filed objections to the report and recommendation, many of which took issue with the magistrate's merits analysis of the alibi/ineffectiveness claim. However, Clinkscale did not object to the magistrate's lack-of-exhaustion conclusion, nor did Clinkscale object to the

magistrate's invocation of Section 2254(b)(2), which only allowed the court to deny the claim.

The district court adopted the report and recommendation and denied the claim on the merits.

Upon Clinkscale's appeal, the warden reiterated the claim of procedural default. "At best, this claim is unexhausted, as the District Court found. At worst, it has been procedurally defaulted by Clinkscale's willful failure to pursue the post-conviction petition as instructed * * *." Warden's Brief, at 14.

The Sixth Circuit reversed and granted a conditional writ. 375 F.3d 420. It found that the direct appeal had been sufficient to exhaust the alibi/ineffectiveness claim. It found that, even regardless of the direct appeal, the claim was not procedurally defaulted because the state appellate court had not clearly and expressly relied on a procedural default in the motion-for-leave proceedings subsequent to the direct appeal. Finally, the Sixth Circuit determined that the alibi/ineffectiveness claim had merit, relying on affidavits and materials that were unavailable to the state appellate court in the direct appeal.

One of the judges concurred in part and dissented in part. 375 F.3d at 446 (McKeague, J.). The dissenter contended that further factual development was needed before a merits determination could be made. The dissenter also disagreed with the majority's analysis of exhaustion and procedural default and contended that those issues should be remanded as well. In regard to exhaustion on direct appeal, the dissenter stated that, "Where, as here, petitioner's fact-

based ineffective assistance claim was presented in a procedural context in which the merits were not considered because the factual record was incomplete, the claim can hardly be deemed to have been 'fairly presented.'" 375 F.3d at 449.

The warden's timely petition for rehearing and suggestion for rehearing en banc was denied on September 17, 2004. This timely petition for writ of certiorari follows.

ARGUMENT

I. Raising a claim of trial counsel ineffectiveness on direct appeal cannot be deemed "exhaustion of state remedies" for federal habeas corpus purposes when the state appellate court declines to rule on that claim due to an inadequate appellate record.

II. When a state trial court enforces a state procedural bar, when a state appellate court affirms the trial court's order enforcing that bar, and when the state courts do not reach the merits of the federal claim, then the state courts have sufficiently complied with the clear-and-express statement rule of *Harris v. Reed*, 489 U.S. 255 (1989).

Two significant errors warrant review by this Court. The first and most significant involves the Sixth Circuit's flawed assessment of the "exhaustion" issue, an assessment which conflicts with the decisions of other federal habeas courts and which conflicts with the reasoning of this Court's decision in *Massaro*. The second error involves the Sixth Circuit's failure to enforce a procedural default that the Ohio courts had clearly and expressly enforced. These flaws warrant

certiorari review and, if certiorari is granted, will eventually warrant reversal and remand for further proceedings in the Sixth Circuit.

I.

A state criminal defendant must exhaust his state court remedies before seeking federal habeas relief. As recently stated in *Baldwin v. Reese*, 541 U.S. 27, 124 S.Ct. 1347, 1349 (2004):

> Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, 28 U.S.C. § 2254(b)(1), thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights. To provide the State with the necessary "opportunity," the prisoner must "fairly present" his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim. (Citations and some internal quotation marks omitted)

As further stated in *Castille v. Peoples*: "The exhaustion requirement * * * is grounded in principles of comity and reflects a desire to protect the state courts' role in the enforcement of federal law[.]" *Castille*, 489 U.S. at 349 (brackets added; citations and quotation marks omitted).

Even though the Ohio Court of Appeals had declined to rule on the alibi/ineffectiveness claim on direct appeal because the appellate record was inadequate, the Sixth Circuit majority concluded that presentation of that claim in the direct appeal

was *sufficient* to exhaust the claim in the state courts. The majority concluded that, although Clinkscale had filed a post-appeal motion for leave to file a motion for new trial, "that avenue of relief was *unnecessary* for purposes of exhausting his ineffective assistance of counsel claim." 375 F.3d at 438, 441 (emphasis added). The Sixth Circuit majority claimed that the alibi/ineffectiveness claim was exhausted because "Clinkscale raised his * * * claim on direct appeal, in which there were no special limitations on the ability of the Ohio Court of Appeals to reach the merits of that claim." *Id.* at 440. "Clinkscale could have asserted his ineffective assistance claim in a habeas petition filed in federal court as soon as the Ohio Supreme Court dismissed his petition for review of the Ohio Court of Appeals' denial of relief on direct appeal." *Id.* at 441.

Coming from appellate judges, these passages reflected a fundamental disconnect with a basic principle of appellate procedure. Appellate courts cannot simply grant relief on any issue at any time; rather, the appellate record must *support* the claim of error, and error will not be presumed.

In Ohio, error cannot be recognized on appeal unless the appellate record actually supports a finding of error. A defendant claiming error has the burden of proving that error by reference to matters in the appellate record. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384, 385 (1980). "[T]here must be sufficient basis *in the record* * * * upon which the court can *decide* that error." *Hungler v. Cincinnati*, 25 Ohio St.3d 338, 342, 496 N.E.2d 912, 915 (1986) (emphasis *sic*).

This requirement of appellate-record support is particularly applicable to claims of trial counsel

ineffectiveness, which must overcome a strong presumption of effectiveness. To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that his trial counsel acted incompetently. *Strickland v. Washington*, 466 U.S. 668 (1984). There is a "strong presumption" that counsel acted within the wide range of reasonable professional assistance. *Id.* at 689, quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955).

Even if a defendant shows that his counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this "actual prejudice" prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

A claim of trial counsel ineffectiveness usually will be unreviewable on appeal because the appellate record is inadequate to determine whether an omitted objection, motion, or defense really had merit and/or because the possible reasons for counsel's actions appear outside the appellate record. *United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995) (*en banc*; "Such claims brought on direct appeal are presumptively dismissible, and virtually all will be dismissed."; "A factual record must be developed in and addressed by the district court in the first instance for effective review.").

Beyond Ohio's basic requirement of appellate-record support, the Sixth Circuit majority overlooked this Court's precedent that confirms the general unreviewability of

ineffective-counsel claims on direct appeal. In *Massaro v. United States, supra*, this Court concluded that a defendant need not raise a claim of trial counsel ineffectiveness on direct appeal in order to preserve it for collateral challenge under 28 U.S.C. § 2255. This Court reached that conclusion because it deemed review on direct appeal to be usually inadequate:

> The background for our discussion is the general rule that claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice. The procedural default rule is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments. We conclude that requiring a criminal defendant to bring ineffective-assistance-of-counsel claims on direct appeal does not promote these objectives.
>
> As Judge Easterbrook has noted, "[r]ules of procedure should be designed to induce litigants to present their contentions to the right tribunal at the right time." Applying the usual procedural-default rule to ineffective-assistance claims would have the opposite effect, creating the risk that defendants would feel compelled to raise the issue before there has been an opportunity fully to develop the factual predicate for the claim. Furthermore, *the issue would be raised for the first time in a forum not best suited to assess those facts.* This is so *even if the record contains some indication of deficiencies* in counsel's

> performance. The better-reasoned approach is to permit ineffective-assistance claims to be brought in the first instance in a timely motion in the district court under § 2255. We hold that an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal.

Massaro, 538 U.S. at 504 (emphasis added; citations omitted).

The *Massaro* decision emphasized the general unreviewability of such claims on direct appeal:

> In light of the way our system has developed, in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective-assistance. When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose. Under *Strickland* * * *, a defendant claiming ineffective counsel must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial. The evidence introduced at trial, however, will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis. If the alleged error is one of commission, the record may reflect the

> action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse. * * * The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them. And evidence of alleged conflicts of interest might be found only in attorney-client correspondence or other documents that, in the typical criminal trial, are not introduced. Without additional factual development, moreover, an appellate court may not be able to ascertain whether the alleged error was prejudicial.

Massaro, 538 U.S. at 504-505 (some citations omitted). "No matter how odd or deficient trial counsel's performance may seem, that lawyer may have had a reason for acting as he did * * *." *Id.* (quoting Easterbrook, J.)

Massaro recognized that the *trial court* is "the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial." *Id.* at 505. Review on direct appeal "in most instances, will produce no benefit." *Id.* at 507. "[F]ew such claims will be capable of resolution on direct appeal * * *." *Id.* It will be "the rare claim that could have been raised on direct appeal * * *." *Id.* (quoting Easterbrook, J.).

The widespread acceptance of the *Massaro* principle is demonstrated by the Sixth Circuit's very own case law. The Sixth Circuit had followed the rule of general unreviewability even prior to *Massaro*. See, *e.g.*, *United*

States v. Aguwa, 123 F.3d 418, 422 (6th Cir. 1997) ("best brought in a post-conviction proceeding"); *United States v. Goodlett*, 3 F.3d 976, 980 (6th Cir. 1993). The Sixth Circuit has followed *Massaro* this year as well. *United States v. DeJohn*, 368 F.3d 533, 548 (6th Cir. 2004) ("[n]ormally, an appellate court does not consider ineffectiveness of counsel on direct appeal, as the record of a defendant's counsel's performance is not fully developed * * *."); *United States v. Foster*, 376 F.3d 577, 593 (6th Cir. 2004).

Under similar circumstances, other federal habeas courts addressing state convictions have found a lack of exhaustion. In *Akins v. Kenney*, 341 F.3d 681 (8th Cir. 2003), the Nebraska Court of Appeals had declined to rule on three claims of trial counsel ineffectiveness because the record on direct appeal was inadequate. Moreover, the prisoner had not pursued one full round of post-conviction review in the Nebraska courts. The Eighth Circuit affirmed the district court's conclusion that the prisoner had not exhausted his state remedies.

In *Mercado v. Senkowski*, 736 F. Supp. 28 (E.D.N.Y. 1990), the prisoner had raised a claim of trial counsel ineffectiveness in his direct appeal in the New York Appellate Division, but he did not pursue discretionary review in New York's highest court, and he did not seek post-conviction review. After rejecting the warden's procedural default argument, the district court concluded that the issue remained unexhausted. "The Appellate Division never had a fair opportunity to address this critical facet of the ineffective assistance of counsel claim solely by reviewing the trial record." *Id.* at 29. The court concluded that it had been "impossible for the New York Appellate

Division to resolve this claim because his argument was dependent on facts outside the record." *Id.* The district court further stated, as follows:

> It does not matter that the ineffective assistance of counsel issue had been raised, though in a seemingly cursory fashion, on direct appeal because the mere presentation of the ineffective assistance of counsel issue on direct appeal does not create a fair opportunity for decision, and consequently does not authorize petitioner to proceed to federal court without seeking a state post-conviction remedy.

Id. (quotation marks and brackets omitted).

To the same effect is *United States ex rel. LaSalle v. Smith*, 632 F. Supp. 602 (E.D.N.Y. 1986), where the district court likewise dismissed a habeas petition for lack of exhaustion. The court concluded that raising the ineffectiveness claim in the direct appeal "was simply the wrong remedy given the nature of his claim" and that the appropriate vehicle for review was post-conviction review.

In *Reyes v. Philips*, 2003 U.S. Dist. Lexis 52, 2003 WL 42009 (S.D.N.Y. 2003), the New York Appellate Division had declined to rule on a claim of trial counsel ineffectiveness that was based on facts outside the appellate record, and the prisoner had not pursued post-conviction relief. The district court concluded that the claim was unexhausted:

> To exhaust an ineffective assistance of counsel claim, all allegations must be presented to the state court

> through an appropriate procedural vehicle, thus allowing the court to examine all of the circumstances and cumulative effect of the claims. * * * A [state post-conviction] motion, rather than a direct appeal relying only on the trial transcript, allows a complete factual record to be developed regarding a counsel's tactical decisions, which in turn gives state courts the opportunity to review the merits of the Sixth Amendment claim as a whole. * * *

The same conclusion was reached in *Ledesma v. Cunningham*, 2003 U.S. Dist. Lexis 14992, 2003 WL 22047147 (S.D.N.Y. 2003), where the court concluded there was a failure to exhaust because the Appellate Division had declined to rule on a claim due to an inadequate record and therefore "was not able to rule fully on the merits of the claim."

While other habeas cases are less on point, such cases confirm that mere presentation of a claim of trial counsel ineffectiveness on direct appeal will not constitute exhaustion when the appellate record was inadequate. *Cruz v. Warden*, 907 F.2d 665, 668 (7th Cir. 1990) (even if failure-to-prepare claim had been raised on appeal, the appellate court could not have addressed it; "without the necessary facts on record, we cannot say that the failure to prepare claim was 'fairly presented' to the appellate court."); *Gornick v. Greer*, 819 F.2d 160, 161 (7th Cir. 1987) ("ineffective assistance of counsel claims often involve facts outside the record and therefore such claims can usually be raised in an Illinois post-conviction proceeding.").

The foregoing case law, including *Massaro*, recognizes that in rare cases the appellate record can be sufficient to allow full review of the ineffectiveness claim on direct appeal. But the Sixth Circuit majority did not invoke the "rare case" exception. It did not say that the Ohio Court of Appeals had erred in saying the record was inadequate on direct appeal. Instead, the Sixth Circuit ignored the question of whether the appellate record was adequate and concluded that presentation of the issue on direct appeal qualified as "exhaustion."

Much of the majority opinion supports the view that the appellate record was insufficient to allow full review on direct appeal. The majority relied heavily on affidavits and the defense investigator's report in concluding that there had been ineffectiveness, see 375 F.3d at 443-45, but the Ohio Court of Appeals had not had access to those materials in the direct appeal. The direct appeal was decided in December 1999, and the defense did not supply those materials to the Ohio courts until it filed the motion for leave to file a motion for new trial over ten months later in October 2000. The Ohio Court of Appeals simply could not have reviewed these materials on direct appeal.

Even if the original appellate record had come to contain these materials, resolution of the issue would have been inappropriate on direct appeal. The materials consist of assertions made by defense attorneys, a defense investigator, and "alibi" witnesses who are the father, friend, and girlfriend of Clinkscale. This "alibi" evidence had not been tested through cross-examination or through adversarial hearing. Moreover, since a claim of trial counsel ineffectiveness waives attorney-client privilege, it would

have been important to determine through other defense documents or information whether these materials were a *full* portrayal of the "alibi" claim, rather than a self-serving, incomplete portrayal that would have fallen apart at trial. The late disclosure itself suggested a lack of confidence in the "alibi" evidence, which, again, warranted an adversarial inquiry into the *bona fides* of the "alibi" before a new trial was awarded. Accepting these untested materials on direct appeal would have been naïve and would have deprived the prosecution of the opportunity to test the credibility of the attorneys, the investigator, and the "alibi" evidence.

As the Ohio Supreme Court has recognized, the defense decision not to comply with the alibi notice requirement sometimes is "an intended, self-serving trial tactic," designed to deprive the prosecution of a fair trial. *State v. Smith*, 17 Ohio St.3d 98, 101, 477 N.E.2d 1128, 1131 (1985). Equally so, untested defense materials, considered without cross-examination and without adversarial testing on direct appeal, would deprive the prosecution of a fair appeal.

It is not automatic ineffective assistance for a defense counsel to delay filing a notice of alibi. The Sixth Circuit majority erred when it said that "there would have been nothing to lose" by filing a notice of alibi. 375 F.3d at 443. In fact, filing a notice of alibi can have a cost. A notice of alibi is also an admission by a party-opponent, and some Ohio case law indicates that the prosecution can introduce the notice of alibi in order to impeach the defense evidence. *State v. Billups*, 68 Ohio App.3d 248, 260-61, 588 N.E.2d 208, 217 (1990) (Whiteside & Bryant, JJ., concurring – evidence as to changes in alibi can be introduced through notices of alibi themselves); *State v. Haynes*, Ohio 9th Dist.

No. 13258, 1988 Ohio App. Lexis 787, 1988 WL 29814 (1988) ("The contradiction between the notices of alibi and the letter and the actual testimony at trial was a proper subject of inquiry."). The notice of alibi ties the defense into a particular theory of the case, and the defense therefore loses the freedom to pursue other possible theories. Needless to say, it would be damaging for the defense to claim an alibi before trial but then claim some other defense at trial. This is why trial counsel Rogers was close to the mark when he said in his affidavit in 2000 that he will not file a notice of alibi until he is certain he has the witnesses available to back it up. The Ohio Court of Appeals correctly declined to rule on the alibi/ineffectiveness claim on direct appeal.

II.

Since the direct appeal cannot be considered to constitute exhaustion, the issue becomes whether the claim was exhausted through the process of filing a motion for leave to file a motion for new trial. Some type of post-conviction review *was* necessary in order to exhaust.

The problem was, and continues to be, that a procedural bar prevented state-court review. The time limit for seeking a new trial expired fourteen days after the verdicts, *i.e.*, in late 1998. But the Sixth Circuit majority refused to recognize the procedural default, since it concluded that the Ohio Court of Appeals had not clearly and expressly stated that its judgment rested on the procedural default of untimeliness. The majority, and also the dissenter, found the decision of the Ohio Court of Appeals to be

ambiguous, with the majority saying "It is unclear on what ground, or grounds, the court's judgment rested." 375 F.3d at 442.

This claim of ambiguity overlooked the narrow procedural posture in which the case came to the Ohio Court of Appeals. It bears repeating that pursuing an untimely motion for new trial is a two-step process, with the first step being whether the defense has shown unavoidable prevention in order to obtain leave to file the motion for new trial. If granted leave, then, and only then, does the defense file its motion for new trial, at which point, then, and only then, could claims of trial error be reviewed on their merits. *Walden, supra*; Oh.Crim.R. 33(B).

The Ohio trial court had not allowed the proceeding to get past the first step. The trial court found that the motion was "grossly out of rule," rejected the defense efforts to claim "unavoidable prevention," and denied the *motion for leave*. The defense efforts had failed at the threshold of untimeliness and procedural default.

The case remained in that narrow procedural posture when it reached the Ohio Court of Appeals. The Court of Appeals could not review the merits because it concluded that the trial court had acted correctly in denying the motion for leave. Understood in this procedural posture, the Ohio Court of Appeals was clearly and expressly resting its judgment on the procedural bar. It was *affirming* the trial court's decision to enforce the procedural bar. It quoted the very language of the procedural bar from Oh.Crim.R. 33(B), and it summarized the standard for "unavoidable prevention,"

which requires a showing that the defendant neither knew nor should have known of the ground for new trial. The court then said:

> Here, the grounds underlying appellant's motion for new trial *were known* at the time the verdict was rendered. Moreover, as appellant concedes, these issues were *already raised* by appellant on direct appeal. As such, there was nothing to be resolved by an evidentiary hearing, and the trial court did not err in denying appellant's motion without such a hearing. Appellant's first assignment of error is overruled. (Emphasis added)

This paragraph shows a clear reliance on the procedural bar. The motion was untimely, and the defendant could not show unavoidable prevention because the defendant was aware of the potential alibi/ineffectiveness ground for new trial at the time of verdict and thereafter during the direct appeal. The first assignment of error had challenged the trial court's refusal to grant leave, but the Court of Appeals overruled that assignment of error and thereby affirmed the trial court's enforcement of the procedural bar. The Sixth Circuit should have considered the "surrounding circumstances" and the disposition reached by the Ohio Court of Appeals, which had affirmed the trial court's enforcement of the procedural bar. See *Ylst v. Nunnemaker*, 501 U.S. 797, 802 (1991).

The Sixth Circuit majority seemed to be saying that Ohio Court of Appeals may have reached beyond the procedural bar. The majority quoted and italicized various passages from the second appellate decision in an effort to find an ambiguity. 375 F.3d at 441-443. But, whatever

reaching beyond this procedural bar occurred, the Sixth Circuit conceded that the state appellate court had not reached the merits of the alibi/ineffectiveness claim. The Sixth Circuit conceded that "no state court has adjudicated the merits of Clinkscale's ineffective assistance claim." 375 F.3d at 436.

Since the Ohio courts did not reach the merits of the federal claim, the issue of whether the Ohio courts clearly and expressly relied on a state procedural bar was entirely inapplicable. As this Court stated in *Coleman v. Thompson*, 501 U.S. 722, 735 (1991), "[a] predicate to the application of the *Harris* presumption is that the decision of the last state court to which the petitioner presented his federal claims must fairly appear to rest primarily on federal law or to be interwoven with federal law." The Sixth Circuit here conceded that the state courts did not reach the merits alibi/ineffectiveness issue, thereby showing that the state court decision did not rest primarily on federal law and was not interwoven with federal law. See *Ylst*, 501 U.S. at 801 ("If the last state court to be presented with a particular federal claim *reaches the merits*, it removes any bar to federal-court review that might otherwise have been available."; emphasis added).

In the final analysis, once it affirmed the denial of the motion for leave, the Ohio Court of Appeals could not have legitimately reached the merits of the alibi/ineffectiveness claim, and the Sixth Circuit agreed that it did not do so.

In response to the warden's procedural-default argument in the Sixth Circuit, Clinkscale contended in his reply brief that the warden waived the issue by failing to object to the

magistrate's report and recommendation. The magistrate rejected "procedural default" on grounds of a still-existing state remedy. But, notably, the Sixth Circuit majority did not rely on a waiver theory and instead rejected procedural default on other grounds.

Clinkscale's waiver argument at best is a double-edged sword, since the lack-of-objection argument cuts against Clinkscale more significantly. The magistrate rejected procedural default only on the narrow ground that the alibi/ineffectiveness claim remained unexhausted. The magistrate specifically rejected Clinkscale's claim that the claim had been exhausted in the direct appeal. These were significant lack-of-exhaustion conclusions, but Clinkscale did not object to them, nor did Clinkscale object to the magistrate's invocation of 28 U.S.C. § 2254(b)(2), which allows a federal court to disregard lack of exhaustion only to *deny* the unexhausted claim on the merits.

The Sixth Circuit majority having disregarded Section 2254(b)(2) in Clinkscale's favor, Clinkscale would be in no position to insist on a waiver theory now. If the Sixth Circuit had applied such a waiver analysis, and if it had done so in an evenhanded way, it would not have granted relief in violation of Section 2254(b)(2) on the basis of what the magistrate determined to be an unexhausted claim.

CONCLUSION

In light of the foregoing, petitioner respectfully requests that this Court grant the petition for writ of certiorari. Upon this Court's granting of certiorari, and upon eventual reversal of the Sixth Circuit opinion, petitioner would request that this Court remand the case so that the Sixth Circuit can determine whether "cause and prejudice" or a "fundamental miscarriage of justice" excuse the procedural default and/or whether Clinkscale's other habeas claims warrant relief.

Respectfully submitted,

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Counsel for Petitioner

December 2004

Supreme Court, U.S.
FILED

04 792 DEC 10 2004

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2004

HAROLD E. CARTER, WARDEN
Petitioner,

-vs-

DAVID B. CLINKSCALE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID B. CLINKSCALE,
Petitioner-Appellant,

v.

No. 02-4219

HAROLD E. CARTER, Warden,
Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 01-00390—Algenon L. Marbley, District Judge.

Argued: December 3, 2003
Decided and Filed: July 8, 2004

Before: MARTIN and MOORE, Circuit Judges;
McKEAGUE, District Judge.*

COUNSEL

---

* The Honorable David W . McKeague, United States District Judge for the Western District of Michigan, sitting by designation.

ARGUED: Carol Wright, Columbus, Ohio, for Appellant. M. Scott Criss, OFFICE OF THE ATTORNEY GENERAL, Columbus, Ohio, for Appellee. **ON BRIEF:** Carol Wright, Columbus, Ohio, for Appellant. M. Scott Criss, OFFICE OF THE ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

MARTIN, J., delivered the opinion of the court, in which MOORE, J., joined. McKEAGUE, D. J. (pp. 26-34), delivered a separate opinion concurring in part and dissenting
in part.

OPINION

BOYCE F. MARTIN, JR., Circuit Judge. David B. Clinkscale, an Ohio prisoner, appeals the district court'sdenial of his petition for a writ of habeas corpus. For the reasons stated below, we REVERSE the district court's judgment and GRANT a conditional writ of habeas corpus.

I. FACTUAL BACKGROUND[1]

In this capital case, a jury convicted Clinkscale of several felony counts, including armed robbery and

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[1] As the facts of this case have been comprehensively recited in previous court decisions, we will highlight only those facts that are dispositive of the issues presented in this appeal.

homicide, stemming from an incident that occurred at the Columbus, Ohio, home shared by Kenneth Coleman – Clinkscale's childhood friend – and Coleman's wife, Todne Williams. At trial, Williams testified that she was awakened by the sound of gunshots at approximately 3:45 in the morning on September 8, 1997. According to Williams, a man – whom she ultimately identified as Clinkscale – proceeded to burst into her bedroom, armed with a pistol, and demanded to know where she and her husband kept their safe. Williams testified that Clinkscale then summoned another man – apparently his partner – to the bedroom, gave him the pistol and directed him to watch her while Clinkscale looked for the safe. Williams further testified that after Clinkscale had located the safe and loaded it into his truck, he retrieved his gun and ordered Williams to lie on the kitchen floor next to the body of her husband, Coleman, who had been fatally shot. At that moment, Williams stated, she ran toward the back door and Clinkscale shot her three times. Despite her injuries, Williams was able to call 911. Notably, although Williams knew Clinkscale as a friend of her husband, she told the 911 operator that she could not identify her assailant.

Clinkscale, testifying in his own defense, maintained that he could not have committed the crimes as charged because he had spent the entire night of September 7 and morning of September 8 in Youngstown, Ohio – approximately one hundred seventy miles from Columbus. Clinkscale testified that he and his friend, Bryan Fortner, spent the evening at Fortner's home watching a professional football game on television, and that Clinkscale's girlfriend, Rhonda Clark, joined them during the game. After the game, Clinkscale testified, he and Clark retired to an upstairs bedroom and remained there until early morning. According

to Clinkscale, he left Fortner's home at approximately 5:00 or 5:30 in the morning, after Clark had left, and he drove ten to fifteen minutes to the home of his father, Arthur Clinkscale, where he was living.

As discussed more fully below, the trial court excluded any other evidence concerning Clinkscale's alleged alibi because his trial attorneys, J. Tullis Rogers and Frederick D. Benton, Jr., failed to file a timely notice of alibi pursuant to Ohio Rule of Criminal Procedure 12.1.[2]

II. PROCEDURAL BACKGROUND

In January 1998, attorneys Rogers and Benton were appointed to represent Clinkscale at trial. Clinkscale immediately informed them of his alibi and the individuals who could corroborate it. The attorneys eventually hired, with funds approved by the trial court in March, an investigator named Richard Smith to gather evidence in an attempt to verify and corroborate Clinkscale's claimed alibi.

The investigator's affidavit indicates that based upon his investigation – which primarily entailed interviewing defendant Clinkscale, Arthur Clinkscale, Bryan Fortner and Rhonda Clark – he believed that Clinkscale did, in fact, have an alibi for which significant corroboration existed. The investigator's affidavit further indicates that he discussed his

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[2] Rule 12.1 provides:
Whenever a defendant in a criminal case proposes to offer testimony to establish an alibi on his behalf, he shall, not less than seven days before trial, file and serve upon the prosecuting attorney a notice in writing of his intention to claim alibi.

investigation and conclusions with Clinkscale's attorneys several times during the months leading up to the trial. Nevertheless, the attorneys failed to inform the court or the prosecution of an intention to present an alibi defense until September 28, 1998 – only a few days before the jury was empaneled – when they gave "verbal notice" to the court of a "possible alibi."

According to the investigator's affidavit, on October 1, 1998, Clinkscale's trial attorneys demanded that he provide them with a written report immediately. The investigator quickly completed his report and provided it to them on Saturday, October 3. The report recounts the investigator's interviews with Clinkscale and the three named alibi witnesses. Specifically, the report states that Clark recalled that at approximately 10:30 p.m. on September 7, she met Clinkscale at Fortner's home and later went with Clinkscale to an upstairs bedroom, where the two remained until she left at approximately 4:00 or 4:30 a.m. Clark also apparently told the investigator that prior to leaving she "nudged" Clinkscale and told him that she had to go home, and that when she left the bedroom Clinkscale was still asleep. The report also provides that Fortner confirmed that Clinkscale spent the evening with him at Fortner's home, that Clark came over during the football game and that Clinkscale and Clark retired to an upstairs bedroom after the game. Finally, the report indicates that Arthur Clinkscale stated that he witnessed his son arrive home at approximately 5:45 or 6:00 a.m. on September 8, at which time the burglar alarm accidentally went off and the two had a conversation.

On October 6, after the jury was empaneled, Clinkscale's trial attorneys filed a written notice of alibi and identified Arthur Clinkscale, Bryan Fortner and Rhonda

Clark as potential alibi witnesses. The trial judge refused, however, to allow any alibi evidence – other than defendant Clinkscale's own testimony – because the notice of alibi was not filed seven days prior to trial, as required by Rule 12.1.[3]

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[3] Shortly after the announcement of this ruling, the following colloquy ensued:

> THE COURT: Anything else before I call in the jury?
>
> THE DEFENDANT: Yes, sir, Your Honor. I, David Clinkscale, feel that I have not been properly represented and I wish to have new counsel if that's possible.
>
> THE COURT: That's not possible.
>
> THE DEFENDANT: Why is that? If I feel I am not being properly represented, why can't I get new counsel?
>
> THE COURT: Because I said you couldn't, that's why. Sit down.

The trial judge then proceeded to describe Rogers's and Benton's considerable educational and professional qualifications, concluding that "[i]f I was so inclined I couldn't appoint two better lawyers in Franklin County than these two." Clinkscale's response was: "Let's roll then. I have got faith in them."

The trial continued and Clinkscale was ultimately convicted. The jury declined to impose the death penalty, and Clinkscale was instead sentenced to life imprisonment without the possibility of parole. Clinkscale appealed his conviction to the Ohio Court of Appeals, alleging, among other claims, that his trial attorneys' failure to file a timely alibi notice constituted ineffective assistance of counsel in violation of the Sixth Amendment. The Ohio Court of Appeals held that it was "unable to make a determination" from the record whether the delay in filing the notice "was the result of trial strategy or was due to counsel's ineffectiveness as alleged," and therefore suggested that Clinkscale assert this claim in a motion for postconviction relief.[4] The Ohio Court of Appeals affirmed Clinkscale's conviction, and the Ohio Supreme Court dismissed his petition for review.

On October 24, 2000, Clinkscale filed, pursuant to Ohio Rule of Criminal Procedure 33, a motion for leave to file a motion for a new trial, indicating that the grounds for the new trial included his trial attorneys' failure to file a timely alibi notice. The trial court denied the motion, the Ohio Court of Appeals again affirmed and the Ohio Supreme Court again denied Clinkscale's petition for review.

Clinkscale next sought relief in federal court. He filed the instant petition for a writ of habeas corpus in the United States District Court for the Southern District of Ohio that

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[4] The Ohio Court of Appeals never indicated the precise form that Clinkscale's motion for post-conviction relief should take, nor the section of the Revised Code under which it should be filed.

asserted various claims, one of which was that his trial attorneys' failure to file a timely alibi notice and/or failure to investigate his alibi in a timely manner deprived him of the effective of assistance of counsel, in violation of the Sixth Amendment. Adopting the magistrate's recommendation, the district court denied the petition, but granted a certificate of appealability with respect to each of the issues that Clinkscale had raised in his petition. Despite the numerous claims presented in the petition, we need only address Clinkscale's claim that his trial attorneys' failure to file a timely alibi notice constituted ineffective assistance of counsel in violation of the Sixth Amendment, as we find this claim to be meritorious.

III. ANALYSIS

A. Standard of Review

We review de novo the district court's denial of Clinkscale's petition for a writ of habeas corpus. *Maples v. Stegall*, 340 F.3d 433, 436 (6th Cir. 2003) ("This court applies de novo review to the decision of the district court in a habeas corpus proceeding.") (citing *Harris v. Stovall*, 212 F.3d 940, 942 (6th Cir. 2000)). The Antiterrorism and Effective Death Penalty Act governs our review of Clinkscale's petition. 28 U.S.C. § 2254. Section 2254(d) of the Act provides as follows:

> **(d)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–

> **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

By its terms, this provision only applies to claims that were "adjudicated on the merits in State court proceedings." *Id. See also Maples*, 340 F.3d at 436; *Newton v. Million*, 349 F.3d 873, 878 (6th Cir. 2003). In this case, no state court has adjudicated the merits of Clinkscale's ineffective assistance claim. Therefore, the deferential standard of review set forth in section 2254(d) is inapplicable. *See, e.g., Maples*, 340 F.3d at 436 ("Where, as here, the state court did not assess the merits of a claim properly raised in a habeas petition, the deference due under [the Act] does not apply.") (citing *Williams v. Coyle*, 260 F.3d 684, 706 (6th Cir. 2001)); *Newton*, 349 F.3d at 878 (same). *Cf. Wiggins v. Smith*, 123 S. Ct. 2527, 2542 (2003) (reasoning that because no state court had determined whether the petitioner had demonstrated the requisite prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), its "review [of that issue was] not circumscribed by a state court conclusion . . . .").

Accordingly, we review Clinkscale's ineffective assistance claim de novo, *Maples*, 340 F.3d at 437, and consider "the totality of the evidence – 'both that adduced at trial, *and the evidence adduced in the habeas*

proceeding[s],'" *Wiggins*, 123 S. Ct. at 2542-43 (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)) (emphasis provided in *Wiggins*). Before considering the merits of Clinkscale's ineffective assistance claim, however, we first address the preliminary questions of whether Clinkscale has exhausted his state remedies and whether the claim has been procedurally defaulted.

B. Exhaustion

In general, we may grant a petition for a writ of habeas corpus only if "it appears that . . . the applicant has exhausted the remedies available in the courts of the State . . . ." 28 U.S.C. § 2254(b)(1). Notably, the state never raised an exhaustion argument in the district court. Similarly, in these proceedings, the state's only reference to exhaustion is a one sentence, passing reference in its brief. Carter Br. at 14. Nevertheless, the Act provides that the state cannot waive or be estopped from relying upon the exhaustion requirement except if the state, through counsel, "expressly waives the requirement," *see* 28 U.S.C. § 2254(b)(3), which has not been done here. We possess the authority to raise and consider the issue of exhaustion *sua sponte*, *Harris v. Rees*, 794 F.2d 1168, 1170 (6th Cir. 1986), and we invoke that authority to consider whether Clinkscale has exhausted his state law remedies.

The Act provides that "[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). The Supreme Court has explained that "[a]lthough this language could be read to effectively foreclose habeas

review by requiring a state prisoner to invoke *any possible* avenue of state court review, we have never interpreted the exhaustion requirement in such a restrictive fashion." *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) (citation omitted) (emphasis in original). Rather, the Court has described the exhaustion requirement as follows:

> Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, we conclude that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process.

O'Sullivan, 526 U.S. at 845.

In *O'Sullivan*, the Court considered whether the petitioner had exhausted the remedies that were available to him in the Illinois courts. The Court reasoned that "Illinois' established, normal appellate review procedure is a two-tiered system. Comity, in these circumstances, dictates that [the petitioner] use the State's established appellate review procedures before he presents his claims to a federal court." *Id.* According to the Court, "a petition for discretionary review in Illinois' Supreme Court is a normal, simple, and established part of the State's appellate review process." *Id.* Therefore, the Court concluded that in order to exhaust his state remedies, the petitioner was required to file a petition for discretionary review with the Illinois Supreme Court. *Id.* In line with the Court's reasoning in *O'Sullivan*, we have held that "[t]o exhaust his or her remedies, a petitioner for federal habeas corpus relief is only required to raise his

claims before the state's highest court." *Manning v. Alexander*, 912 F.2d 878, 883 (6th Cir. 1990).

Additionally, a petitioner must have "'fairly presented' the substance of each of his federal constitutional claims to the state courts . . . ." *Hannah v. Conley*, 49 F.3d 1193, 1196 (6th Cir. 1995) (citations omitted). *See also O'Sullivan*, 526 U.S. at 844 (section 2254(c) "requires only that state prisoners give state courts a *fair* opportunity to act on their claims") (emphasis in original); *Manning*, 912 F.2d at 881 ("The exhaustion requirement is satisfied when the highest court in the state in which the petitioner was convicted has been given a full and fair opportunity to rule on the petitioner's claims."). As we have explained:

> A petitioner can take four actions in its brief which are significant to the determination as to whether a claim has been fairly presented: (1) reliance upon federal cases employing constitutional analysis; (2) reliance upon state cases employing federal constitutional analysis; (3) phrasing the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleging facts well within the mainstream of constitutional law."

Newton, 349 F.3d at 877. *See also Levine v. Torvik*, 986 F.2d 1506, 1516 (6th Cir.), *cert. denied*, 509 U.S. 907 (1993) ("A petitioner 'fairly presents' his claim to the state courts by citing a provision of the Constitution, federal decisions using constitutional analysis, or state decisions employing constitutional analysis in similar fact patterns.").

In this case, Clinkscale presented his ineffective assistance claim to the Ohio Court of Appeals on direct appeal of his conviction. When the Ohio Court of Appeals denied relief on this claim – purportedly on the ground that the record was insufficient to permit a determination whether the alleged error was part of Clinkscale's attorneys' "trial strategy" – Clinkscale filed a petition for review of that decision in the Ohio Supreme Court. When the Ohio Supreme Court dismissed the petition, Clinkscale had fulfilled his obligation of invoking "one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 845. Clinkscale had also "fairly presented" the legal and factual bases of his ineffective assistance claim to the Ohio courts. *Hannah*, 49 F.3d at 1196. Clinkscale's brief in support of his direct appeal explicitly presents this claim as the fourth assignment of error, which reads as follows:

> Defendant-Appellant was denied his right to the effective assistance of counsel guaranteed to him under U.S. Const. amend. VI and XIV and Ohio Const. art. I, § 10 based upon the following: . . . (c) defense counsel failed to file a timely notice of alibi resulting in the exclusion of the third party corroborating alibi testimony . . . .

The brief goes on to cite *Strickland v. Washington*, 466 U.S. 668 (1984), as controlling legal precedent, and to set forth and develop the facts that allegedly establish the constitutional violation. By taking these actions, Clinkscale "fairly presented" his ineffective assistance claim to the Ohio courts. *See, e.g., Newton*, 349 F.3d at 877; *Levine*, 986 F.2d at 1516. Although Clinkscale subsequently filed in the state trial court a post-conviction motion for leave to file a motion for a new trial, which was based in part upon trial counsel's

alleged ineffectiveness, that avenue of relief was unnecessary for purposes of exhausting his ineffective assistance of counsel claim.

That the Ohio Court of Appeals declined to reach the merits of the ineffective assistance claim – and instead suggested that the claim be raised in a motion for post-conviction relief – does not alter our conclusion that Clinkscale exhausted his state remedies. First, it is beyond peradventure that exhaustion does not require a state court adjudication on the merits of the claim at issue. *Smith v. Digmon*, 434 U.S. 332, 333 (1978) ("It is too obvious to merit extended discussion that whether the exhaustion requirement of 28 U.S.C. § 2254(b) has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court . . . ."); *Manning*, 912 F.2d at 883 ("The fact that the state court does not address the merits of the claim[s] does not preclude a finding of exhaustion.") (citing *Harris*, 794 F.2d at 1173).

Second, we are aware of no legal authority holding that a petitioner who properly and fairly presents a claim on direct appeal to the state's intermediate appellate court and highest court, but who fails to file a later collateral motion as suggested by the intermediate appellate court, has failed to exhaust state remedies. To impose such an onerous and unjustified burden upon a petitioner in the absence of any explicit authority establishing such a requirement would be imprudent, unwarranted and manifestly unfair.[5]

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[5] Notably, when Clinkscale gave the state courts a further opportunity to review his ineffective assistance claim – via the post-conviction new trial motion – the Ohio Court of

Third, a habeas petitioner need not exhaust any and all remedies that are potentially available to him in state court. *See O'Sullivan*, 526 U.S. at 844-45 (holding that a petitioner need only exhaust those remedies that comprise a state's "standard," "established," "normal" appellate review process) (citing *Wilwording v. Swenson*, 404 U.S. 249, 249-50 (1971) (*per curiam*) (rejecting the notion that a petitioner must invoke "any of a number of possible alternatives to state habeas . . . ."). Here, as discussed, Clinkscale has invoked and exhausted all levels of Ohio's standard, established appellate review process.

Finally, under the somewhat unique facts of this case, the stated reason that the Ohio Court of Appeals denied relief was based upon a misunderstanding of the nature of the

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Appeals essentially chastised him for asserting this claim a second time in state court:

> [A]s appellant concedes, these issues were already raised by appellant on direct review. As such, there was nothing to be resolved by an evidentiary hearing, and the trial court did not err in denying appellant's motion without such a hearing. . . .
> Appellant concedes that these issues were previously raised on direct appeal, but purports to raise them again for purposes of preserving them for federal court review. Given appellant's concession in this regard and our resolution of appellant's first assignment of error, appellant's second assignment of error is not well-taken and is overruled.

ineffective assistance inquiry. According to the Ohio Court of Appeals, the reason it could not reach the merits of Clinkscale's claim was that it was "unable to reach a determination as to whether the delay was the result of trial strategy or was due to counsel's ineffectiveness as alleged." This explanation implies that if the delay was strategic, then it necessarily could not constitute ineffective assistance of counsel. As explained more fully below, however, "[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000) (citing *Strickland*, 466 U.S. at 688).

Our dissenting colleague's disagreement with our exhaustion holding stems in part from his view that the magistrate ruled that Clinkscale had failed to exhaust his state remedies, and that this ruling "must be left undisturbed." We do not share this view. The magistrate's report and recommendation concededly contains a few isolated statements that could be interpreted as pertaining to exhaustion – the most favorable of which, from the dissent's point of view, are listed in footnote one of the separate opinion. Those statements, however, are vague, hypothetical and unclear, and are scattered throughout a five-page, convoluted discussion of *procedural default*, not exhaustion, that improperly confuses the two doctrines. It was procedural default, not exhaustion, that the state had argued, and it was procedural default, not exhaustion, that the magistrate's report and recommendation analyzes (ultimately finding in Clinkscale's favor on that issue). While the dissent attempts to excise these isolated statements from the report and recommendation and to recast them as a clear ruling of nonexhaustion, in our view no such ruling was made. Given our conclusion that the magistrate never held that Clinkscale

had failed to exhaust his state law remedies, there is no finding of non-exhaustion that must be left "undisturbed."

The separate opinion also asserts that our conclusion that Clinkscale exhausted his state remedies "flies in the face of the teaching of *Castille v. Peoples*, 489 U.S. 346, 350-51 (1989)." But *Castille* is so distinguishable from the present case that, if relevant at all, it actually lends further support to our conclusion. In *Castille*, the Court considered whether a habeas petitioner had exhausted his state remedies by presenting his federal constitutional claims in two separate motions for allocatur to the Pennsylvania Supreme Court, without previously having sought any relief on those claims in any lower state court. In Pennsylvania, "allocatur review 'is not a matter of right, but of sound judicial discretion, and an appeal will be allowed only when there are special and important reasons therefor.'" *Id.* at 347 (quoting Pa. R. App. P. 1114). The Court held that the petitioner's motions for allocatur, without more, were insufficient to constitute "fair presentation" of his federal claims to the state courts. *Id.* at 351. According to the Court, "where the claim has been presented for the first and only time in a procedural context in which its merits will not be considered unless 'there are special and important reasons therefor,' . . . [r]aising the claim in such a fashion does not, for the relevant purpose, constitute 'fair presentation.'" *Id.* (citations omitted).

Unlike the petitioner in *Castille*, Clinkscale raised his ineffective assistance of counsel claim on direct appeal, in which there were no special limitations on the ability of the Ohio Court of Appeals to reach the merits of that claim.[6] In

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[6] As we have explained, Clinkscale then proceeded to seek further review in the Ohio Supreme Court, but to no avail.

more general terms, the sole factor determining the outcome in *Castille* is entirely absent in this case. Thus, if *Castille* has any relevance here, it corroborates our conclusion that Clinkscale has fairly presented his claim to the Ohio state courts.

C. Procedural Default

We now turn to the state's argument that Clinkscale has procedurally defaulted this ineffective assistance claim. Under the procedural default doctrine, "[a] federal court is generally barred from considering an issue of federal law arising from the judgment of a state court if the state judgment 'rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the [state] court's decision.'" *Frazier v. Huffman*, 343 F.3d 780, 790 (6th Cir. 2003) (quoting *Harris*, 489 U.S. at 260). *See also Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). We apply a four-part test in determining whether a habeas claim has been procedurally defaulted:

> First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule. . . . Second, the court must decide whether the state courts actually enforced the state procedural sanction. . . . Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim. . . . Once the court determines that a state procedural rule was not complied with and that the

> rule was an adequate and independent state ground, then the petitioner must demonstrate . . . that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Maupin v. Smith, 785 F.2d 135, 138 (6th Cir. 1985).

In this case, when the Ohio Court of Appeals declined to reach the merits of Clinkscale's ineffective assistance claim on direct appeal, it did so because of its preference that the claim be raised in a post-conviction motion, not because of Clinkscale's failure to comply with a procedural rule. Under Ohio law, claims alleging ineffective assistance of trial counsel are permitted to be raised on direct appeal, *see Statev. Perry*, 226 N.E.2d 104 (Ohio 1967), and Clinkscale properly took advantage of that opportunity. The Ohio Court of Appeals' decision denying relief does not even mention an applicable procedural rule, let alone "clearly and expressly state[] that its judgment rests on a state procedural bar." *Frazier*, 343 F.3d at 791 (quoting *Harris*, 489 U.S. at 263). Therefore, not even the first *Maupin* procedural default factor is satisfied.

As discussed, Clinkscale's further attempt to obtain relief in state court – *i.e.*, his filing of a post-conviction motion for leave to file a motion for a new trial – was entirely unnecessary for purposes of preserving federal court review, and is irrelevant to our analysis of procedural default.

Clinkscale could have asserted his ineffective assistance claim in a habeas petition filed in federal court as soon as the Ohio Supreme Court dismissed his petition for review of the Ohio Court of Appeals' denial of relief on direct appeal.

Therefore, even if the Ohio Court of Appeals, in affirming the denial of Clinkscale's post-conviction new trial motion, refused to address the merits of his ineffective assistance claim because of a failure to comply with a state procedural rule, that would not bar federal court review of Clinkscale's ineffective assistance claim. In other words, because on direct appeal Clinkscale properly exhausted his state remedies and did not commit a procedural default, he never had to file a subsequent post-conviction motion in state court; thus, any procedural default that may have occurred with respect to that later, unnecessary post-conviction motion simply does not matter for purposes of this analysis. Our conclusion in this regard comports with the purpose of the procedural default rule. "In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism." *Coleman*, 501 U.S. at 722. Those concerns are satisfied here because the Ohio courts were given a full and fair opportunity to adjudicate and grant relief on Clinkscale's federal constitutional ineffective assistance claim on direct appeal, and they never refused, on procedural grounds, to rule on that claim.

But even if we were to consider the post-conviction state court proceedings in our procedural default analysis, we would conclude that no procedural default occurred in those proceedings. That is because the decision of the Ohio Court of Appeals affirming the denial of Clinkscale's postconviction new trial motion did not "clearly and expressly state[] that its judgment rest[ed] on a state procedural ground." *Harris*, 489 U.S. at 263; *Frazier*, 343 F.3d at 791. In its memorandum decision affirming the trial court's denial of the motion, the court began by characterizing the trial court's ruling as follows:

> On October 24, 2000, the trial court denied appellant's motion without a hearing, finding that appellant failed to satisfy the requirements under [Rule 33] for filing an untimely motion for a new trial *and that appellantmerely sought to reargue issues previously raised in his direct appeal.*

(Emphasis added.)

The Ohio Court of Appeals then proceeded to analyze
Clinkscale's two assignments of error, which were:

> [1] The trial court erred in failing to grant leave to file
> a motion for new trial or at a minimum, hold an evidentiary hearing on the motion for leave, thereby denying appellant his Sixth Amendment right to the effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.
>
> [2] Appellant was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution when trial counsel failed to timely file a notice of alibi, failed to object to . . . the admission of other prejudicial acts, failed to object to misleading prosecutorial argument and failed to object to inadmissible hearsay evidence.

With regard to Clinkscale's first assignment of error, the court held:

> Here, the grounds underlying appellant's motion for new trial were known at the time the verdict was rendered. *Moreover, as appellant concedes, these issues were already raised by appellant on direct appeal. As such,there was nothing to be resolved by an evidentiary hearing, and the trial court did not err in denying appellant's motion without such a hearing.*

(Emphasis added.) As to Clinkscale's second assignment of error, the court held:

> *Appellant concedes that these issues were previously raised on direct appeal, but purports to raise them againfor purposes of preserving them for federal court review.*Given appellant's concession in this regard and our resolution of appellant's first assignment of error, appellant's second assignment of error is not well-taken and is overruled.

(Emphasis added.)[7]

As the above-quoted language demonstrates, the Ohio Court of Appeals' decision does not "clearly and expressly state[]" that it was based on non-compliance with Rule 33. Although the decision unquestionably mentions Rule 33 and its requirements, it also emphasizes and relies upon the fact that Clinkscale's ineffective assistance claim had already been raised on direct appeal. It is unclear on

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[7] The Ohio Supreme Court dismissed Clinkscale's petition for review of this decision.

what ground, or grounds, the court's judgment rested. Under these circumstances, we are unable to say that the Ohio Court of Appeals' decision "clearly and expressly states that its judgment rests on a state procedural bar." *Harris*, 489 U.S. at 263; *Frazier*, 343 F.3d at 791.

For these reasons, Clinkscale has not procedurally defaulted his ineffective assistance claim. We now turn, therefore, to the merits of that claim.

D. Ineffective Assistance of Counsel

Our review of Clinkscale's ineffective assistance claim is governed by the familiar two-prong test set forth in *Strickland*. In order to satisfy the first prong, Clinkscale must prove that his counsel's representation was deficient in that it "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. In considering this issue, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged conduct might be considered sound trial strategy." *Id.* at 689. The second prong of *Strickland* requires Clinkscale to demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of [his trial] would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

We note at the outset that a number of courts have found ineffective assistance of counsel in violation of the Sixth Amendment where, as in this case, a defendant's trial counsel fails to file a timely alibi notice and/or fails

adequately to investigate potential alibi witnesses. *See, e.g., Blackburn v.Foltz*, 828 F.2d 1177 (6th Cir. 1987); *Johns v. Perini*, 462 F.2d 1308 (6th Cir. 1972) (applying pre-*Strickland* standard); *Brown v. Meyers*, 137 F.3d 1154 (9th Cir. 1998); *Bryant v.Scott*, 28 F.3d 1411 (5th Cir. 1994). For the reasons stated below, the same result is compelled in this case.

With respect to the first prong of *Strickland*, the state relies upon the conclusion of the district court (and the magistrate) that Clinkscale failed to present sufficient evidence to rebut the presumption that his attorneys' failure to file a timely alibi notice was part of a "sound trial strategy." *Strickland*, 466 U.S. at 489. What that conclusion fails to recognize, however, is that even if Clinkscale's attorneys subjectively believed that failing to file an alibi notice on time was in some way strategic – which is doubtful[8]**8** – such a "strategy" cannot, under the circumstances presented in this case, be considered objectively "sound," *id.*, or "reasonable," *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000) ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.").

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[8] Although Attorney Rogers's October 13, 2000, affidavit – which appears somewhat self-serving – claims that "[t]he defense team made a strategic decision not to file a Notice of Alibi until we were sure that we could back it up with credible witnesses and corroboration," Attorney Benton's July 26, 2002, affidavit admits: "I have no explanation for failing to file the Notice timely. I believe it was error on our part."

At least where – as here – alibi is a critical aspect of a defendant's defense, there is nothing reasonable about failing to file an alibi notice within the time prescribed by the applicable rules when such failure risks wholesale exclusion of the defense. In this case, there would have been nothing to lose, yet everything to gain, from filing the alibi notice in compliance with Rule 12.1. Such a course of action would have preserved Clinskcale's right to assert an alibi defense, but at the same time would not have tied him into asserting such a defense at trial. *See Williams v. Florida*, 399 U.S. 78, 84 (1970) ("Nothing in [a rule such as Rule 12.1] requires the defendant to rely on an alibi or prevents him from abandoning the defense; these matters are left to his unfettered choice."). Therefore, based upon our consideration of counsel's overall performance, and in view of all the facts in the record, we find that Clinkscale has met his burden, under the first prong of *Strickland*, of establishing that the performance of his trial counsel fell below an objective standard of reasonableness.

Having found the first prong of *Strickland* satisfied, we now consider the second. The district court held that Clinkscale "failed to demonstrate that he was prejudiced since he has failed to offer an affidavit from the alleged alibi witnesses demonstrating that they would have given testimony corroborating the alibi." This holding is contrary to both law and fact. First, no legal authority has been identified – and we are aware of none – specifically requiring that a defendant claiming ineffectiveness of counsel based on the failure to file a timely alibi notice must produce an affidavit from the potential alibi witnesses documenting the substance of their anticipated testimony. Second, and in any event, the district court simply

overlooked the fact that Clinkscale has, in fact, submitted such an affidavit from one potential alibi witness: his father, Arthur Clinkscale.

As noted, Arthur Clinkscale's affidavit states that he saw his son "at approximately 5:45 to 6:00 a.m." on September 8 when defendant Clinkscale returned home, and that "[w]hen [defendant Clinkscale] entered the home[,] he accidentally set off the burglar alarm. We had a conversation and then [defendant Clinkscale] went to his room." The affidavit further states: "I arranged for Bryan Fortner and Rhonda Clark to be at my home to be interviewed by Mr. Smith [the defense investigator] . . . . Both Mr. Fortner and Ms. Clark were present and were interviewed by Mr. Smith. They confirmed that [defendant Clinkscale] was in Youngstown the evening of September 7, 1997 before he came home in the early morning hours of September 8, 1997." Finally, the affidavit confirms that Arthur Clinkscale had been, and continues to be, willing to testify to these events at any trial or hearing.[9]

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[9] The state attacks the significance of Arthur Clinkscale's affidavit on the grounds that: (1) he is defendant Clinkscale's father and therefore has a motive to lie; and (2) the substance of his affidavit "only barely provide[s] an alibi for Clinkscale" because "Clinkscale could certainly have driven from Columbus to Youngstown in the hours between the shooting and the time his father allegedly saw him that morning." State Br. at 16. These arguments are unavailing. In considering the significance of this affidavit, our role is limited to determining whether there is a "reasonable probability" that the outcome of Clinkscale's trial would have been different but for his counsel's errors. *Strickland*, 466 U.S. at 694. The factors that the state has highlighted

In addition to Arthur Clinkscale's affidavit, the record contains other evidence – specifically, the investigator's affidavit and written investigative report – that provides some indication of the facts to which Arthur Clinkscale, Bryan Fortner and Rhonda Clark might have testified if called as alibi witnesses. As discussed, the investigator's affidavit states that based upon his investigation, he believed that defendant Clinkscale had an alibi that could be corroborated by these three witnesses and possibly others, and the investigative report details the substance of that corroboration. For example, the report indicates that: (1) Arthur Clinkscale told the investigator essentially the same version of events as set forth in his affidavit; (2) Bryan Fortner confirmed that Clinkscale and Clark were at Fortner's home throughout the evening and night of September 7, and that Clinkscale and Clark retired to a bedroom after the three watched a professional football game on television; and (3) Clark confirmed that she went to Fortner's home on the evening of September 7, and that she and Clinkscale spent the night there together until she departed at "approximately 4:00 a.m./4:30 a.m."

But for Clinkscale's attorneys' failure to file the alibi notice in a timely manner, Clinkscale would have been permitted to call these – and other – witnesses to testify on his behalf. The undisputed evidence indicates that Arthur Clinkscale certainly would have testified to the events set forth in his affidavit and the investigative report. Moreover,

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may ultimately affect the credibility of Arthur Clinkscale's testimony in the eyes of the jury, but they are not dispositive with respect to our analysis.

it is reasonable to assume, based upon the investigator's affidavit and report, that Fortner and Clark also would have given testimony corroborating Clinkscale's alibi. As it was, Clinkscale's only meaningful defense – for which no evidence other than his own testimony was deemed admissible – was that he could not have committed the crimes as charged because he was in Youngstown at the time with his close friend, Bryan Fortner, his girlfriend, Rhonda Clark, and his father, Arthur Clinkscale. The fact that none of these individuals could provide any corroboration for this alleged alibi certainly must have significantly affected the jury's assessment of Clinkscale's guilt. Had even one alibi witness been permitted to testify on Clinkscale's behalf, Clinkscale's "own testimony would have appeared more credible because it coincided in important respects with those of his alibi witness[(es)]." *Brown*, 137 F.3d at 1157. "[W]ithout any corroborating witnesses," however, Clinkscale's testimony "left him without any effective defense." *Id.*[10]

Clinkscale's claim of prejudice is further supported by the notable weaknesses in the prosecution's case. *See Strickland*, 466 U.S. at 696 (explaining that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with

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[10] Additionally, had someone other than Clinkscale been permitted to testify that Clinkscale was in Youngstown at the time the crimes were committed, Clinkscale himself "could have exercised his right not to testify." *Pitts v. Le Cureux*, 156 F.3d 1231, at *3 (6th Cir. 1998) (unpublished opinion). In that event, the jury would not have heard damaging testimony elicited from Clinkscale on cross-examination concerning his possession of firearms.

overwhelming record support."). By far the most damaging evidence against Clinkscale was the trial testimony of Williams, the surviving victim, during which she identified Clinkscale as the individual who shot her. Even putting aside our "grave reservations concerning the reliability of eyewitness testimony," *Blackburn*, 828 F.2d at 1186 (citing *Wilson v. Cowan*, 578 F.2d 166, 168 (6th Cir. 1978)), the accuracy of Williams's identification is highly suspect. As stated, Williams told a 911 operator just after the shooting that she did not know the identity of the shooter, yet she has admitted to knowing Clinkscale, as a friend of her husband, prior to the night in question. Additionally, after eventually identifying Clinkscale as the shooter, Williams identified his alleged partner in crime as an individual named Darren Hornbuckle. The police conclusively determined, however, that Hornbuckle could not have been involved in the crimes. These and other weaknesses in the prosecution's case serve to bolster Clinkscale's claim of prejudice. *See Strickland*, 466 U.S. at 696. Moreover, because the central focus of Clinkscale's trial was the identity of the perpetrator, the evidence essentially boiled down to a credibility contest between Williams and Clinkscale. Under these circumstances, Clinkscale's inability to provide any supporting testimony for his strongest defense must be considered especially damaging and prejudicial.

For these reasons, we hold that Clinkscale has discharged his burden, under the second prong of *Strickland*, of proving that there is a "reasonable probability" that the outcome of his trial would have been different but for his trial counsel's deficient performance. *Id.* at 694.[11]

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[11] The dissent takes issue with our decision to address the merits of Clinkscale's ineffective assistance claim, and

IV. CONCLUSION

"The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Id.* at 685. Clinkscale's trial attorneys played no such role in this case, and their actions have seriously undermined the fundamental fairness of Clinkscale's trial and the justness of his conviction. For all the foregoing reasons, we REVERSE the district court's judgment and GRANT a conditional writ of habeas corpus, giving the State of Ohio ninety days in which to retry Clinkscale or release him from state custody.

CONCURRING IN PART, DISSENTING IN PART

DAVID W. McKEAGUE, District Judge, concurring in part and dissenting in part. The majority opinion addresses three issues: exhaustion, procedural default, and the merits of

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believes that the more appropriate course of action would be to remand this case to the district court for an evidentiary hearing "to allow completion of the record" and for an analysis in the first instance of the merits of the claim. Aside from the fact that neither party has requested remand, we see no purpose for it. The existing record is sufficient to permit a decision on the merits of Clinkscale's ineffective assistance claim, and the district court has already rendered such a decision – which, as we have explained, is erroneous. Under these circumstances, remanding this case to the district court would be an exercise in futility.

petitioner's ineffective assistance of counsel claim. Addressing the last of these issues first, I concur in the conclusion that the district court's judgment denying the petition on the merits should be vacated. For the reasons that follow, I am constrained to conclude, however, on the present record, that the Sixth Circuit is no less prohibited than the district court from *granting* the writ – even conditionally. I therefore concur in part and dissent in part.

I

The district court reached the merits of petitioner's ineffective assistance claim notwithstanding petitioner's failure to exhaust available state court remedies, pursuant to 28 U.S.C. § 2254(b)(2), which allows a federal court only to deny, not grant, an unexhausted habeas petition. Report and recommendation, p. 25, J.A. 50. Applying *Strickland v. Washington*, 466 U.S. 668 (1984), the district court concluded petitioner had failed to carry his burden both of overcoming the strong presumption that counsel's purported strategic choice not to give timely notice of alibi defense was reasonable; and of demonstrating that, even if counsel's performance was deficient, such deficiency so prejudiced petitioner as to deny him a fair trial. *Id.* at 25-30, J.A. 50-55. For the reasons set forth in Part III.D of the majority opinion, I, too, would hold the district court erred in its conclusion, based on the record before it, that the ineffective assistance claim must be denied.

The record presented suggests petitioner has a colorable claim, but the record is not sufficiently clear and complete to enable a definitive ruling either way. The insufficiency of the record is evident in the majority's analysis. For instance, with respect to the first prong of the

Strickland test, the majority recognizes the conflict between the affidavits of petitioner's two trial attorneys, one claiming that the late filing of the alibi defense notice was the function of strategic choice, and the other surmising that it was a matter of error by counsel. The record offers no explanation of the "strategic choice" and no means of reconciling the two affidavits. The district court resolved the difficulties by holding simply that petitioner has failed to carry his burden, while ignoring his request for an evidentiary hearing. The majority, on the other hand, relies on its deduction that the unexplained strategic choice is "self-serving" and "doubtful." Because the majority is unable to conceive of a *sound* reason for the late filing of the notice, it finds the "strong presumption" of *Strickland* adequately rebutted.

Similar ambiguities undermine evaluation of the second *Strickland* prong as well. In holding that petitioner had not shown prejudice, the district court noted that petitioner had offered no proof of the nature of his putative alibi witnesses' testimony or even that they would in fact have been available and willing to so testify. The majority correctly points out that the district court erroneously ignored the affidavit of one of the alibi witnesses, petitioner's father. The majority concedes that the father's credibility is not unassailable, but finds corroboration of petitioner's alibi in an investigator's affidavit and report. Using these sources, the majority launches into speculation regarding what "is reasonable to assume" and what the alibi witnesses "might have testified" to if they had been called.

My purpose is not to attack the soundness of the majority's speculation, but to highlight the inadequacy of the present record. Faced with this inadequacy, the district court, in my opinion, had two legitimate alternatives. First, it could

have granted petitioner's request for an evidentiary hearing, to allow completion of the record before evaluating the merits. Second, it could have dismissed the claim without prejudice, because unexhausted, and allowed petitioner to pursue his remedies, potentially including an evidentiary hearing, in the state courts. For reasons evident below, the first alternative is superior. Indeed, this is the course recently taken by the Sixth Circuit in *Bigelow v. Williams*, 367 F.3d 562 (6th Cir. 2004). Faced with a habeas claim based on ineffective assistance where counsel's supposed strategic decision was, on the record presented, "unexplained, if not inexplicable," *id.*at 573, the *Bigelow* court remanded the matter to the district court for further proceedings, possibly including an evidentiary hearing, to determine both prongs of the *Strickland* standard in the first instance. In "rushing to judgment" on the merits of petitioner's claim, rather than remanding to the district court for clarification of the record, the majority simply declares the record to be sufficient and then supplies the missing details with its own supposition and speculation. I respectfully submit that completion of the factual record is a task better committed to the district court.

Further, in refusing to recognize that deficiencies in the record are due in part to petitioner's failure to exhaust an available state court remedy, the majority goes to great lengths to explain why petitioner's failure to exhaust is no impediment to reaching the merits, reasoning even that the exhaustion requirement *has* been satisfied, even though neither party has challenged the district court's contrary conclusion in this appeal. In this regard, too, for the reasons set forth below, I find the majority's approach flawed.

II

In analyzing the exhaustion issue, the majority purports to write on a blank slate, observing that, although the respondent has not expressly asserted the defense, it is not waived and may be raised *sua sponte*. Albeit true, this approach nonetheless ignores the fact that the district court first raised the issue *sua sponte* and, in a ruling that remains unchallenged on appeal, held the exhaustion requirement had not been satisfied.[1] It comes as no surprise that respondent has not challenged this conclusion on appeal, for it redounds

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[1] The district court's ruling is reflected in the following excerpts from the magistrate judge's report and recommendation, approved by the district court over objection (on other grounds only):

> A federal court may grant relief on a petition for a writ of habeas corpus only if the applicant has exhausted the remedies available in the state court. 28 U.S.C. § 2254(b)(1)(A).
>
> . . . .
>
> Issues that must be raised in a post-conviction action pursuant to O.R.C. § 2953.21 include claims which do not appear on the face of the record and claims of ineffective assistance of trial counsel where the defendant was represented on direct appeal by the same attorney who represented him at trial.
>
> . . . .
>
> In addition to raising each claim in the appropriate forum, a habeas litigant, in order to preserve his constitutional claims for habeas review,

to respondent's benefit. Neither is petitioner's silence on the issue surprising, as he even conceded in his petition that the claim was unexhausted and actually moved the district court to stay proceedings on the petition pending exhaustion of state remedies. Petition for writ of habeas corpus, ¶7, J.A. 8.

> must present those claims all the way through the Ohio courts.
>
> . . . .
>
> Since petitioner did not actually file a post-conviction petition, the state courts did not enforce a procedural bar, and it is not entirely clear that petitioner is barred from pursuing postconviction relief. . . . . Thus, Ohio law does not clearly foreclose consideration of a post-conviction petition. Although such a petition would be untimely, the trial court could choose to entertain it. Petitioner still has a remedy in state court if he can file a post-conviction action to assert this claim.
>
> . . . .
>
> However, pursuant to 28 U.S.C. § 2254(b)(2), [a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the state."

Report and recommendation pp. 20-25, J.A. 45-50. Thus, the magistrate judge turned to analyze the merits of petitioner's claim only after determining that it was unexhausted and after recognizing that the district court was free only to deny, not grant, the claim without first requiring exhaustion.

The parties' reasons for focusing their appellate arguments on the merits of the claim, rather than exhaustion, are thus understandable. Nevertheless, these reasons do not justify our departure from the well-settled rule that issues not raised on appeal are deemed abandoned. *See Mitchell v. Chapman*, 343 F.3d 811, 825 n.15 (6th Cir. 2003); *Security Watch, Inc. v. Sentinel Systems, Inc.* 176 F.3d 369, 376 (6th Cir. 1999). If the rule is adhered to, then the district court's finding of nonexhaustion must be left undisturbed. It follows that once we have determined the district court's denial of the claim on its merits is flawed, but we refrain from remanding the matter for reconsideration based on a fuller factual development, we are left with a finding of non-exhaustion that should, ordinarily, in compliance with 28 U.S.C. § 2254(b)(1) and in the interests of comity, require dismissal of the claim pending exhaustion. *See Rockwell v. Yukins*, 217 F.3d 421, 424-25 (6th Cir. 2000)(vacating judgment granting habeas relief and remanding for dismissal without prejudice because petition contained unexhausted claim, even though meritorious claim had been exhausted).

Yet, without even mentioning the district court's treatment of the exhaustion issue, the majority takes it up *de novo* and finds that the claim *is* exhausted. In my opinion, the
majority's approach is not only procedurally improper, but also substantively erroneous. The conclusion that the claim is exhausted is based on the finding that the claim was, on direct review, "fairly presented" to the Ohio Court of Appeals and Ohio Supreme Court. To reach this conclusion, the majority relies on the established principle that exhaustion does not necessarily require state court adjudication of the asserted claim, and that a claim that is

fairly presented but ignored by the state court may be deemed exhausted. The facts of this case, however, do not come within this principle.

There is no dispute, of course, that petitioner did assert, on direct review, his ineffective assistance claim based on the late filing of the notice of alibi defense. The Ohio Court of Appeals did not decide the merits of the claim, but neither did it ignore the claim. Its analysis is contained in one paragraph:

> In his third claim, defendant maintains that counsel were ineffective for not timely filing defendant's notice of alibi. As noted, counsel did clearly indicate that they were aware of the alibi witnesses before the disclosure deadline set forth in Crim.R. 12.1; however, the record contains no explanation of the reason behind the late disclosure. For example, the record does not disclose whether trial counsel failed to investigate or to interview defendant's alleged alibi witnesses. As a result, we are unable to reach a determination as to whether the delay was the result of trial strategy or was due to counsel's ineffectiveness as alleged. As the reason for the late disclosure is not a part of the record before this court, defendant must pursue his claim of ineffective assistance based upon the late disclosure by way of a motion for post-conviction relief.

Ohio Court of Appeals Opinion, Dec. 23, 1999, p.19, J.A. 417. The Ohio Supreme Court denied leave to appeal.

The Ohio courts thus refrained from reaching the merits of the claim because the factual record was deemed

incomplete. Petitioner was expressly advised to pursue the claim by filing a motion for post-conviction relief, i.e., a mechanism that would potentially allow for supplementation of the factual record through an evidentiary hearing.

Yet, quite apart from whether petitioner ever pursued the recommended motion, the majority holds that petitioner had exhausted the claim simply by including it in his direct appeal. This holding flies in the face of the teaching of *Castille v. Peoples*, 489 U.S. 346, 350-51 (1989). In *Castille*, the Supreme Court made it clear that presenting a claim for the first and only time in a procedural context in which its merits will not necessarily be considered does not constitute "fair presentation." *Id.* at 351. Indeed, as the majority recognizes, the exhaustion requirement demands that the state courts be given a full and fair opportunity to rule on the factual, as well as the legal, bases of a claim. *Caver v. Straub*, 349 F.3d 340, 346 (6th Cir. 2003); *Newton v. Million*, 349 F.3d 873, 877 (6th Cir. 2003); *Hannah v. Conley*, 49 F.3d 1193, 1196 (6th Cir. 1995). Where, as here, petitioner's fact-based ineffective assistance claim was presented in a procedural context in which the merits were not considered because the factual record was incomplete, the claim can hardly be deemed to have been "fairly presented." *See Hall v. Huffman*, 234 F.3d 1268 (Table), 2000 WL 1562821 at **3 (6th Cir. Oct. 11, 2000)(applying *Castille* under closely analogous circumstances and remanding unexhausted claim for dismissal without prejudice).

Accordingly, inasmuch as remand to the district court for reconsideration of the merits based on a fuller factual development is not acceptable to the majority, I would alternatively affirm the district court's ruling that the claim is

unexhausted and would therefore hold the claim subject to dismissal without prejudice.[2]

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[2] In footnote 5 of the majority opinion, mention is made of petitioner's motion for new trial, made after his direct appeal was denied. In this motion for new trial, petitioner did assert his ineffective assistance claim based on a supplemented factual record. The motion had been denied by the trial court as untimely and the appeal of this denial was pending when petitioner filed his habeas petition. It was due to the pendency of this appeal that petitioner admitted in his petition that the claim remained unexhausted.

During the pendency of the habeas petition in the district court, i.e., before both the report and recommendation and judgment issued , the Ohio Court of Appeals and Ohio Supreme Court had finally denied appellate relief on the motion for new trial. Inexplicably, however, neither the report and recommendation nor the district court judgment includes any reference to these state court proceedings – in connection with either the exhaustion or procedural default analysis.

In my opinion, though the majority has not relied on it, the outcome of these subsequent state court proceedings represents arguably persuasive evidence that petitioner had in fact exhausted (and procedurally defaulted) his claim before the district court ruled on the habeas petition. Hence, if the matter were to be remanded for reconsideration of the merits, the district court would be properly directed to also reconsider, as appropriate, the exhaustion and procedural default issues in light of these further developments.

III

Finally, for reasons derivative of the above exhaustion analysis, I must take issue with the majority's treatment of procedural default as well. The district court rejected respondent's procedural default defense essentially because the subject claim had not been exhausted (through the filing of an appropriate motion for post-conviction relief) and the state courts therefore did not have occasion to enforce a procedural bar.[3] Without even acknowledging the district court's ruling on the issue and the rationale therefore, the majority likewise concludes that the Ohio appellate courts' rejection of the claim on direct review was due not to enforcement of a procedural bar, but due to the inadequacy of
the record. Ignoring the fact that the record was inadequate because petitioner had not exhausted an available state remedy, the majority nonetheless correctly concludes the claim cannot be deemed procedurally defaulted on the basis of the direct review proceedings alone.

The majority goes on to discuss the significance of the Ohio courts' disposition of petitioner's motion for new trial. Even though the motion's untimeliness was clearly one reason for the trial court's denial and the appellate court's affimance of the denial, the majority is "unable to say" the state courts enforced a procedural bar because the state courts' decisions also rested on other grounds.

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[3] Again, the district court ignored the significance of petitioner's motion for new trial.

The exact rationale for the Ohio Court of Appeals' decision affirming denial of the motion for new trial is concededly ambiguous, at least in part. Its significance to our exhaustion and procedural default analyses is therefore uncertain. The uncertainty is exacerbated by the unexplained failure of the parties and the district court to address it in any way. Yet, the Ohio courts' disposition of the motion for new trial is potentially significant to both the exhaustion and procedural default analyses. These circumstances, too, counsel in favor of remand to the district court for reconsideration, for ordinarily, the Sixth Circuit will not consider an issue not decided below unless "the proper resolution is beyond doubt" or "injustice might otherwise result," neither of which circumstances is presented here. *Baker v. Sunny Chevrolet,Inc.*, 349 F.3d 862, 866 (6th Cir. 2003); *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 427 (6th Cir. 2002). Accordingly, if the case were to be remanded for reconsideration of the merits, then the district court would be properly directed to also reconsider the exhaustion and procedural default issues in light of these further state court proceedings.

IV

In sum, although I agree that the district court's denial of the writ should be vacated, I believe that granting a conditional writ of habeas corpus on the present record constitutes overreaching. Instead, the matter should be remanded to the district court for completion of the record and reconsideration as indicated above.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

[FILED 9-18-02]

David B. Clinkscale	JUDGMENT IN A CIVIL CASE
vs	Case No. C2-01-390
Warden Harold E. Carter	Judge Marbley Magistrate Judge Abel

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

[X] **Decision by Court.** This action was decided by the court without a trial or hearing.

IT IS ORDERED AND ADJUDGED that the petition for writ of habeas corpus is **DENIED**.

Date: September 18, 2002 Kenneth J. Murphy, Clerk

/s/ Scott Miller
By Scott Miller/Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

David B. Clinkscale,	[filed 9-18-02]
Petitioner	Case No. C-2-01-390
v.	Judge Marbley
Warden Harold E. Carter,	Magistrate Judge Abel
Respondent	

ORDER

Petitioner David B. Clinkscale, a state prisoner, brought this action for writ of habeas corpus under 28 U.S.C. §2254. This matter is before the Court on petitioner's objections to Magistrate Judge Abel's June 18, 2002 Report and Recommendation that the petition for writ of habeas corpus be denied.

Petitioner advances the following grounds for habeas corpus relief:

> 1. Petitioner was denied his right to due process and a fair trial guaranteed to him under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution when the trial court excluded the testimony of alibi witnesses due to defense counsel's negligent failure to file a notice of alibi.

2. Petitioner was denied the effective assistance of counsel when trial counsel failed to timely investigate and file a notice of alibi although they were informed by their client of the alibi several months before trial in violation of the Sixth Amendment to the U.S. Constitution.

3. Petitioner was denied the effective assistance of counsel when trial counsel failed to object, during the state's case, to other acts evidence of Petitioner's possession of numerous firearms and during the case actually elicited such evidence from petitioner; failed to object to improper and misleading comments made during the state's closing argument; failed to object to hearsay testimony which improperly bolstered the in-court identification of Todne Williams in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

4. Petitioner was denied his rights to the effective assistance of counsel in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution when he was denied his motion to discharge his appointed counsel on the ground that counsel has negligently failed to timely file a notice of alibi.

Each of these arguments will be considered below.

Alibi. Petitioner failed to file a notice of alibi within seven days of trial as required by Ohio Crim. R. 12.1. The case had been continued for trial on a number of occasions. The alibi defense involved the testimony of petitioner's girlfriend and father. His counsel offered no reasonable explanation

why the defense had not been thoroughly investigated and notice of alibi given within the time required by Ohio Crim. R. 12.1.

Although petitioner has provided a copy of his investigator's October 3, 1998 report relating statements made to him by Rhonda Clark, Arthur Clinkscale, and Bryan Fortner supporting his claim that they were with him during the time of the murder, there is absolutely no explanation of why the investigator was unable to interview these three people until more than a year after petitioner was charged with the murder. Further, petitioner has failed to offer any affidavits from the three witnesses supporting his claim of alibi and indicating that they were willing to testify in his defense at trial.

The Ohio Court of Appeals found that petitioner failed to give any explanation of why the notice of alibi was not filed within the time required by Ohio Crim. R. 12.1. It further found that the trial court did not err in excluding the alibi witnesses when the notice of alibi was given until jeopardy had attached. Those findings are binding on this Court. 28 U.S.C. §2254(e). For the reasons stated in the Magistrate Judge's Report and Recommendation, the Court concludes that this claim for relief is without merit.

Effective Assistance of Counsel: Failure to Give Notice of Alibi. Petitioner has failed to demonstrate that his counsel rendered ineffective assistance when they failed to file a timely notice of alibi. From their affidavits, it appears that they acted promptly once petitioner advised them of the notice of alibi, but their investigator was unable to corroborate the alibi until more than a year after Clinkscale was charged with the murder. The Court further agrees with

the Magistrate Judge's finding that even if counsel were ineffective, petitioner has failed to demonstrate that he prejudiced since he has failed to offer an affidavit from the alleged alibi witnesses demonstrating that they would have given testimony corroborating the alibi.

Ineffective Assistance of Counsel: Trial Court Error and Prosecutorial Misconduct. For the reasons set out in the Report and Recommendation at pp. 30-39, the Court concludes that petitioner was not denied the effective assistance of counsel.

Ineffective Assistance of Counsel: Motion to Discharge Appointed Counsel. Petitioner's request to fire his attorneys came after the trial had already begun. He had earlier changed counsel, and the trial had been postponed several times. The Court concludes that petitioner was not denied any constitutional right in connection with the trial court's request to fire his attorneys during the trial.

The petition for writ of habeas corpus is DENIED. The Clerk of Court is DIRECTED to enter JUDGMENT for respondent.

/s/ Algenon L. Marbley
Algenon L. Marbley, Judge
United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[filed 6-18-02]
DAVID B. CLINKSCALE,

Petitioner,

vs.

HAROLD E. CARTER, WARDEN

Respondent.

Case No. C2-01-390

JUDGE MARBLEY

MAGISTRATE JUDGE ABEL

REPORT AND RECOMMENDATION

Petitioner, a state prisoner, brings this action for a writ of habeas corpus pursuant to 28 U.S.C. §2254. Petitioner argues that the trial court violated his constitutional rights when it excluded alibi witnesses testimony due to counsel's failure to file a notice of alibi defense as required by the Ohio Rules of Criminal Procedure. Petitioner also asserts that he received constitutionally deficient representation. Respondent argues that the trial court properly excluded petitioner's alibi witnesses, and that counsel was not ineffective. This matter is before the Magistrate Judge on the petition, respondent's answer, petitioner's traverse and the exhibits of the parties. For all of the following reasons the Magistrate Judge concludes that the writ should not issue.

I. Facts and Procedural History.

The facts of this case were set forth by the Franklin County Court of Appeals.

> Defendant and Kenneth Coleman were childhood friends who grew up together in Youngstown, Ohio. Coleman eventually left Youngstown and moved to Columbus. After relocating to Columbus, however, Coleman became heavily involved in gambling and the sale of illegal narcotics. Coleman operated at least two "crack houses" in the city and was known to carry firearms and large amounts of cash.
>
> The events leading up to Coleman's murder began when Coleman invited defendant to join him at a dogfight on Saturday, September 6, 1997. Defendant accepted Coleman's invitation and arrived from Youngstown with his cousin, Jerome Woods, on the afternoon of Wednesday, September 3. Defendant and Woods checked into a hotel room that evening and met Coleman and on of his drug dealers, Pete Davis, at a nearby tavern. All four men met at another tavern the following evening, but did not meet again until the afternoon of Saturday, September 6.
>
> At approximately 12:30 p.m., Saturday afternoon, defendant and Woods met Coleman, Davis, and another of Coleman's drug dealers, Gerry Joseph, at Coleman's home. Thereafter, the five joined four or five carloads of people and left for Cincinnati, Ohio.

Upon arrival in Cincinnati, defendant, Woods, Coleman, Davis, and Joseph rented a single room at a hotel close to the location of the dogfight.

After dark, the five men left their hotel room for a barn located in rural Kentucky. The main event scheduled that evening was a fight in which Coleman had entered his dog. Soon after the fight began, Coleman accused the owner of the other dog of a rule infraction. Coleman's accusation apparently led to a heated argument between many of the individuals who had placed bets on the outcome of the fight. Ultimately, the dispute was resolved by a "gentlemen's agreement" between Coleman and the owner of the other dog, whereby the fight was cancelled, and all bets were refunded.

Apparently, Gerry Joseph was less than satisfied with the manner in which Coleman chose to settle his dispute with the owner of the other dog. He and Coleman subsequently became involved in their own argument, which ultimately prompted Coleman to refuse to allow Joseph to ride back to Columbus in his vehicle. As a result, Coleman and Davis drove back to Columbus while the other three men drove back in defendant's vehicle.

According to the defendant, he, Woods, and Joseph returned to Columbus at approximately 4 a.m. on Sunday, September 7, 1997. Defendant testified that after dropping Joseph off, he and Woods returned to their hotel and went to sleep for a short while. Defendant claims that at about 9 a.m., he and Woods checked out of their hotel room, went shopping, and

then ate lunch. Thereafter, defendant and Woods left for Youngstown. Upon arriving in Youngstown, defendant claims to have met with his cousin, Brian Fortner, to watch an 8 p.m. football game. After the game, defendant testified that he spent the night with his girlfriend, Rhonda Clark. In short, defendant claims to have been in Youngstown, and not in Columbus, on the night Coleman was murdered.

The testimony of Coleman's wife, Todne Williams, directly contradicted defendant's testimony as to his whereabouts at the time of Coleman's murder. According to Williams, Coleman returned home early on the morning of Sunday, September 7, 1997. Upon his arrival, the two spoke briefly, and Coleman mentioned that defendant and woods had planned to come over later that day to play a new video game defendant had purchased.

According to Williams, defendant and a friend, presumably Woods, did come over to meet Coleman later that Sunday. Williams testified that she recognized defendant from seeing him on numerous occasions when he had visited her husband. Soon after their arrival, defendant, Coleman, and the third man, began playing and placing bets on defendant's new video game. This continued well into the night and the next morning. Early that next morning, Williams awoke at approximately 1 a.m. and came down form her bedroom to get a bottle for her baby. When she did, Williams noticed that the defendant and his friend were still playing defendant's video game with her husband.

A short while after returning to her bedroom, Coleman came upstairs to retrieve money from a safe he kept in the bedroom closet. Coleman then went back downstairs, and Williams soon fell back to sleep. However, at about 3:45 a.m., Williams as awakened by the sound of gunfire. Williams testified that after hearing the first gunshot, defendant burst into her bedroom. According to Williams, defendant was armed with a pistol, was sweating profusely, and demanded that Williams show him where Coleman kept his money. Williams responded that he should ask her husband. However, defendant purportedly responded that it would not be possible to ask Coleman, and then yelled down for the third man to come upstairs. When the third man entered the room, defendant handed him the pistol and told him to watch Williams while he looked for the money.

Defendant eventually located Coleman's safe at which time he directed his partner to get the keys to his trunk. Defendant then loaded the safe into the truck while his partner watched Williams. After loading the safe, defendant returned to the home and took back his pistol. As he did, he told the third man to get in the truck and that he would "take are of" Williams. After the third man left the house, defendant wiped off the front door handle and ordered Williams to lie on the kitchen floor next to Coleman's body. At that moment, Williams began to run for the backdoor and a scuffle ensued. During the struggle, defendant shot Williams in the face. Williams fell to the ground, but managed to get up again. Defendant then shot Williams two additional times and then fled the residence.

> After defendant left, Williams managed to place an emergency call to 911. Both the police and paramedics responded. Williams, who was bleeding profusely from her head and arms, was rushed to the hospital. During the process of securing the crime scene, the police found Coleman's body on the kitchen floor. The subsequent autopsy revealed that Coleman had did as a result of a single gunshot wound to the back of his head.

State v. Clinkscale, (December 23, 1999), Franklin App. No. 98AP-1586, 2000 WL 775607, unreported; Exhibit O to *Answer/Return of Writ*.

On September 29, 1997, the Franklin County Grand Jury returned an indictment charging petitioner with three counts of aggravated murder, one count of attempted aggravated murder, one count of aggravated burglary, two counts of aggravated robbery, and one count of kidnapping. *Id.* Each count of the indictment included an associated firearm specification. *Id.* Additionally, each of the aggravated murder counts included death penalty specifications. *Id.*

On October 16, 1998, a jury found petitioner guilty of each of the counts and specifications contained in the September 29, 1997, indictment. The trial court subsequently accepted the jury's recommendation and sentenced petitioner to a term of life imprisonment without the possibility of parole. *Id.*

Petitioner appealed to the Franklin County Court of Appeals, asserting the following four assignments of error:

The court of common pleas erred and denied Defendant-Appellant his rights to the effective assistance of counsel and to due process and a fair trial guaranteed to him under U.S. Const. amend. V, VI, and XIV and Ohio Const. art. 1, § 10 and 16 when it denied his motion to discharge his appointed counsel on the ground that counsel negligently failure to timely file a notice of alibi and a disclosure of alibi witnesses. Alternatively, the failure of the court of common pleas to conduct an adequate investigation into the basis of Defendant-Appellant's dissatisfaction with the representation provided by his appointed counsel prior to ruling on his motion to discharge them was error and denied him his constitutional rights.

The court of common pleas erred and denied Defendant-Appellant his right to due process and a fair trial guaranteed to him under U.S. Const. amend. V, and XIV and Ohio Const. Art. 1 § 16 when it granted the State of Ohio's motion to exclude the testimony of his alibi witnesses due to defense counsel's negligent failure to file a notice of alibi within the time requirements of Crim. R. 12.1.

The improper and highly misleading remarks made by the prosecuting attorney during closing argument concerning the latent fingerprint evidence, which remarks were not based upon testimony in the record and served to undermine a key theory of defense, rose to the level of plain error and violated Defendant-Appellant's right to due process and a fair

> trial guaranteed to him under U.S. Const. amend. V and XIV and Ohio Const. art. 1, § 16.
>
> Defendant-Appellant was denied his right to the effective assistance of counsel guaranteed to him under U.S. Const. amend. VI and XIV and Ohio Const. art. 1, § 10 based upon the following: (a) during the prosecution case, defense counsel failed to object to "other acts" evidence of Defendant-Appellant's possession of numerous firearms and during the defense case, defense counsel actually elicited such evidence from Defendant-Appellant and thereby opened the door to damaging cross-examination on the same subject; (b) defense counsel failed to object to the improper and misleading comments made during the State's closing argument; (c) defense counsel failed to file a timely notice of alibi resulting in the exclusion of the third party corroborating alibi testimony; and (d) defense counsel failed to object to inadmissible hearsay testimony which improperly bolstered the in-court identification made by the sole eyewitness to the charged crimes.

State v. Clinkscale, (December 23, 1999), Franklin App. No. 98AP-1586, 2000 WL 775607, unreported; Exhibit O to *Answer/Return of Writ.* The court of appeals affirmed petitioner's convictions on December 23, 1999. Id. The Supreme Court of Ohio dismissed petitioner's appeal on April 19, 2000. *State v. Clinkscale*, 88 Ohio St. 3d 1482 (2000); Exhibit R to *Answer/Return of Writ.*

On October 24, 2000, petitioner filed a motion seeking leave to file a motion for a new trial pursuant to

Ohio Crim. R. 33. Exhibit S to *Answer/Return of Writ.* The trial court denied petitioner's motion on December 20, 2000. Exhibit T to *Answer/Return of Writ.* Petitioner filed a timely appeal from the trial court's decision raising the following two assignments of error.

> The trial court erred in failing to grant leave to file a motion for a new trial or at a minimum, hold an evidentiary hearing on the motion for leave, thereby denying appellant his Sixth Amendment right to the effective assistance of counsel, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.
>
> Appellant was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution when trial counsel failed to timely file a notice of alibi, failed to object to object to [sic] the admission of the other prejudicial acts, failed to object to misleading prosecutorial argument and failed to object to inadmissible hearsay evidence.

On September 4, 2002, the court of appeals issued an opinion overruling petitioner's two assignments of error. *State v. Clinkscale*, (September 4, 2001), Franklin App. No. 00AP-1479, unreported; Exhibit W to *Answer/Return of Writ.* The Supreme Court of Ohio declined further review on December 5, 2001. *State v. Clinkscale*, 93 Ohio St.3d 1497 (2001); Exhibit Z to *Answer/Return of Writ.*

The instant petition was filed on April 25, 2001, setting forth the following five grounds for relief:

PETITIONER AS DENIED HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL GUARANTEED TO HIM UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE TRIAL COURT GRANTED THE STATE OF OHIO'S MOTION TO EXCLUDE THE TESTIMONY OF ALIBI WITNESSES DUE TO DEFENSE COUNSEL'S NEGLIGENT FAILURE TO FILE NOTICE OF ALIBI.

PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO TIMELY INVESTIGATE AND FILE A NOTICE OF ALIBI ALTHOUGH THEY WERE INFORMED BY THEIR CLIENT OF THE ALIBI SEVERAL MONTHS BEFORE TRIAL IN VIOLATION OF THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION.

THE STATE COMMITTED MISCONDUCT WHEN IT ENGAGED IN HIGHLY MISLEADING ARGUMENT CONCERNING THE LATENT FINGERPRINT TESTIMONY, WHICH REMARKS WERE NOT BASED UPON TESTIMONY OF THE RECORD AND SERVED TO UNDERMINE THE THEORY OF DEFENSE IN VIOLATION OF THE PETITIONER'S RIGHT TO DUE PROCESS, A FAIR TRIAL, AND THE EFFECTIVE ASSISTANCE OF COUNSEL.

PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO OBJECT, DURING THE

STATE'S CASE, TO OTHER ACTS EVIDENCE OF PETITIONER'S POSSESSION OF NUMEROUS FIREARMS AND DURING THE DEFENSE CASE ACTUALLY ELICITED SUCH EVIDENCE FROM PETITIONER; FAILED TO OBJECT TO THE IMPROPER AND MISLEADING COMMENTS MADE DURING THE STATE'S CLOSING ARGUMENT; FAILED TO OBJECT TO HEARSAY TESTIMONY WHICH IMPROPERLY BOLSTERED THE IN-COURT IDENTIFICATION MADE BY TODNE WILLIAMS IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PETITIONER WAS DENIED HIS RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN HE AS DENIED HIS MOTION TO DISCHARGE HIS APPOINTED COUNSEL ON THE GROUND THAT COUNSEL NEGLIGENTLY FAILED TO TIMELY FILED A NOTICE OF ALIBI AND DISCLOSURE OF ALIBI WITNESSES.

Record 3, Petition.

II. Standard of Review.

Federal habeas review of the state courts' decision in this case is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), because petitioner filed his petition for a writ of habeas corpus in the district court after

the effective date of the statute. See *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). The AEDPA provides that:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on a unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254 (d). The Supreme Court, in *Williams v. Taylor*, 529 U.S. 362 (2000), recently resolved some confusion among the circuits by holding that both the "contrary to" and "unreasonable application" clauses of the statute have independent meaning. See *Machacek v. Hofbauer*, 213 F.3d 947 (6th Cir. 2000), cert. denied, 531 U.S. 1089 (2001). Because petitioner's claims do not implicate the "contrary to" clause of §2254 (d)(1), this Court focuses its inquiry on the Supreme court's interpretation of the "unreasonable application" prong of the statute.

In *Williams*, the Supreme Court held that "under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct

governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 120S. Ct. at 1523. Thus, "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 521. The Court did not specifically define "objectively unreasonable," but it observed that "an unreasonable application of federal law is different from an incorrect application of federal law." *Id.* at 1522. As the Court explained, a federal habeas court may not issue a writ of habeas corpus under the "unreasonable application" prong "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.*

III. Third Claim for Relief.

Initially, this Court would note that in Petitioner's traverse, petitioner indicates that "petitioner hereby withdraws his third claim for relief." Record 21. Accordingly, petitioner's third claim for relief is withdrawn and will not be addressed by this Court.

IV. Notice of Alibi.

Petitioner first argues that the trial court improperly excluded his alibi witnesses due to counsel's failure to file a timely notice of alibi. The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. The Supreme Court held in *In re Oliver*, 333 U.S. 257, 273 (1948), that:

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in this defense-a right to his day in court-are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.

Id. at 273; see also *Washington v. Texas*, 388 U.S. 14, 19 (1967). A state may apply its procedural rules, but may not do so in a manner that violates a defendant's right to present a defense. *Id.*; see also *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Nonetheless, the Supreme Court allows states to enforce certain procedures , including notice-of-alibi provisions, if the enforcement does not infringe on a defendant's constitutional rights. *Taylor v. Illinois*, 484 U.S. 400 410-12 (1988); *Williams v. Florida*, 399 U.S. 78, 81-82 (1970).

A trial court may exclude an alibi defense on the grounds that the defense failed to file a notice of alibi if the reason for the failure is determined to be "willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence." *Taylor*, 484 U.S. at 415. In *Williams v. Florida*, 399 U.S. 78 (1970), the United States Supreme Court acknowledged that sound reasons exist for requiring that a notice of alibi be filed prior to trial.

> Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate. Reflecting this interest, notice-of-alibi provisions,

> dating at least from 1927, are now in existence in a substantial number of States. The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played . . .

Id. at 81-82.

The Ohio Rules of Criminal Procedure require a written notice of alibi be filed not less than seven days before trial.[1] Absent notice, a trial court may exclude alibi evidence. Ohio R. Crim. P. 12.1. The Ohio Supreme Court has developed a three-part test to determine if a defendant may be exempt from the requirements of Crim.R. 12.1: (1) was the notice of alibi withheld by the defendant from the prosecution in bad faith; (2) does the newly asserted alibi evidence constitute a surprise or prejudice the prosecution;

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[1] Ohio Crim. R. 12.1 provides that:

> Whenever a defendant in a criminal case proposes to offer testimony to establish an alibi on his behalf, he shall, not less than seven days before trial, file and serve upon the prosecuting attorney a notice in writing of his intention to claim alibi. The notice shall include specific information as to the place at which the defendant claims to have been at the time of the alleged offense. If the defendant fails to file such written notice, the court may exclude evidence offered by the defendant for the purpose of proving such alibi, unless the court determines that in the interest of justice such evidence should be admitted.

Id.

and (3) is the alibi evidence necessary to insure a fair trial" *State v. Smith*, 50 Ohio St. 2d 51 (1977) following *Williams v. Florida*, 399 U.S. 78 (1970). In analyzing petitioner's claim, the court of appeals stated:

> . . .
>
> In this case the trial court did not act arbitrarily or unreasonably when it enforced Crim.R. 12.1 and excluded testimony from defendant's proposed alibi witnesses. On two occasions the trial court thoroughly discussed with counsel the implications of defendant's failure to file a timely notice of alibi. The court began by noting that it had allocated funds well in advance of trial to enable counsel to conduct the investigation necessary to carry out the defendant's defense. Continuing, the court noted that defendant's case had been continued on a number of occasions, and that between four and six status conferences had been conducted. In its own words, the court stated:
>
> . . .
>
> I have continued this case a number of times, and as I indicated yesterday, I've had 4 or 5 or 6 status conferences, pre-trials, and I think it's fair to say I have given everything to the defense that they have asked. . . . I'm at a loss, complete loss to know why this investigator comes up with this alibi on the 3rd of October, after the trial has begun, when I authorized money for investigation in this case in March, during which time the defendant's [sic] been in the Franklin County Jail available to you to speak to on a daily

basis if you so desired. And between March and now the defendant has been in open court 5 or 6 times on different motions and hearings. And again, I reiterate what I said yesterday, when your are talking about an alibi, that couldn't be more unsophisticated. The alibi is simply that: I the defendant, stayed overnight with a friend in Youngstown on the date in question. I have no information that indicates this friend has been difficult to locate . . . This alibi, I reiterate, did not require any sophisticated testing with regard to blood, DNA, or anything like that . . . So I have to question it being withheld in bad faith. I can't – I have been given no reason whatsoever, nor do I know of one why this couldn't have been verbally given by the defendant to counsel a long time ago.

. . .

I am not talking about an alibi that was filed a little late, I'm talking about an alibi, as far as I know, is still not in my file. I'm talking about an alibi that I first got notice of the same day we impaneled the jury and jeopardy attached. I'm talking about a totally unsophisticated alibi that requires no particular investigation beyond a phone call to Youngstown, Ohio, no test, no scientific evidence, [and] no investigation . . . . [Tr. Vol. II, at 54-57]

On the record, defense counsel stated only that the notice of alibi had been untimely filed due to the fact that their investigator had forwarded a report concerning his activities to counsel only three days prior to trial. We too have to question then, at a minimum, why counsel failed to file the notice of

alibi that day or request an extension before jury selection began, and before jeopardy attached. Moreover, given the nature of his defense, it would seem almost impossible for defense counsel to conclude even their first meeting with the defendant without discussing defendant's claim that he as in Youngstown on the night that Coleman was murdered. Indeed, although defense counsel did not reveal to the court exactly when they became aware of defendant's alibi witnesses, counsel did state on the record that they had knowledge of the witnesses before the report of the investigator was ever concluded.

THE COURT: Why didn't you file a Notice of Alibi when you found out about it?

. . .

[COUNSEL]: Your Honor, I don't recall the exact date, but in all candor to the court, I'm not going to sit here and suggest I just found out yesterday.

THE COURT: I'm sorry?

[COUNSEL]: I don't recall the exact date, but I'm not going to set here and suggest to the court in all candor that I just found out yesterday. That would not be the case. [Tr. Vol: II, at 61-62.]

Given the foregoing, we are unable to agree with defendant's claim that the trial court erred when it

found strong evidence suggesting that the notice of alibi had been withheld at least knowingly and perhaps in bad faith.

As for the second prong of the test, we believe that the last minute request to allow the testimony of defendant's friend and girlfriend both surprised and prejudiced the prosecution. As set forth by counsel for the state, the prosecution had no notice of alibi, no opportunity to interview or investigate defendant's proposed alibi witnesses, and was prejudiced by the apparent tactics of defense counsel as to the alibi defense. Specifically, counsel had fully prepared the state's case and trial strategy while under the impression that defendant did not plan on calling alibi witnesses. Thus, at an absolute minimum, the prosecution would have required a significant continuance in order to conduct last minute investigation and discovery pertaining to the defendant's alleged alibi witnesses.

However, prior to defendant's disclosure, the parties and the court had completed the arduous process of empanelling a jury in a capital murder case. Because defendant waited until after jeopardy attached, the court was unable to postpone jury selection in order to grant the prosecuting a continuance without unduly burdening the members of the jury. Moreover, having readied defendant's case for trial, the court had cleared its calendar of other matters which could have received its attention and, thus, would have unnecessarily delayed justice to other litigants who were ready to proceed to trial.

. . .

> Although given ample opportunity to do so, defense counsel offered no explanation for why defendant's notice of alibi had not been filed within the minimum requirements of Crim.R. 12.1. Again, although noting that counsel had been aware of these witnesses, counsel did not state that their failure to disclose those witnesses had been a tactical decision, had been a result of circumstances outside their control, or had constituted mere oversight or neglect. As the prosecution had no notice of defendant's intent to present an alibi defense, no opportunity or reason to conduct an investigation and discovery in regard to defendant's proposed witnesses, and in light jeopardy attached, we are unable to conclude that the trial court erred when it enforced the rules of criminal procedure.

State v. Clinkscale, (December 23, 1999), Franklin App. No. 98AP_1586, 2000 WL 775607, unreported, Exhibit O to *Answer/Return of Writ.*

The Court finds no reason to dispute the findings of the Ohio court of appeals with respect to defense counsel's failure to file a notice of alibi. In reviewing the claim under state law, the Ohio court of appeals considered the same facts relevant to the Sixth Amendment claim now before the court. This Court's review of the record in this case leads to the conclusion that petitioner's counsel made a willful, tactical decision not to inform the prosecution of the alibi witnesses. Whether considered under state or federal law, the trial court acted within its discretion to reject the petitioner's alibi evidence, and petitioner's constitutional rights were not

violated when the trial court excluded the testimony of his alibi witnesses. See *Taylor*, 484 U.S. at 411013. Accordingly, petitioner's first claim for relief must be denied.

V. Ineffective Assistance of Counsel.

Petitioner next asserts that he failed to receive constitutionally effective representation. Petitioner argues that counsel was ineffective for filing to timely file a notice of alibi, failed to object to evidence of petitioner's possession of numerous firearms, failed to object to misleading comments during the state's closing argument and failed to object to hearsay testimony concerning the in court identification made by Todne Williams. Respondent argues that petitioner has procedurally defaulted his claim that counsel was ineffective for failing to file a notice of alibi, and that in any event, petitioner has failed to demonstrate prejudice as a result of any action by his trial counsel.

A federal court may grant relief on a petition for a writ of habeas corpus only if the applicant has exhausted the remedies available in the state court. 28 U.S.C. § 2254(b)(1)(A). "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law . . . ." *Coleman v. Thompson*, 501 U.S. 722, 750-51 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977). A state prisoner may also avoid default by demonstrating that a failure to consider the claim will result

in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750; see also *Murray v. Carrier*, 477 U.S. 478 (1986).

In determining whether a claim has been procedurally defaulted, the United States Court of Appeals for the Sixth Circuit has applied the following four-part test: (1) the court must determine that there is a state procedural rule with which the petitioner failed to comply; (2) the court must determine whether the state courts actually enforced the state procedural sanction; (3) the state procedural rule must have been an adequate and independent state procedural ground upon which the state could rely to foreclose review of a federal constitutional claim, and (4) if the court has determined that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate that there was cause for failure to follow the rule and that actual prejudice resulted from the alleged constitutional error. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986);' see also *Scott v. Mitchell*, 209 F.3d 854, 863-64 (6th Cir.), cert. denied, 531 U.S. 1021 (2000). This "cause and prejudice" analysis also applies to failures to raise or preserve issues for review at the appellate level. *Leroy v. Marshall*, 757 F.2d 94 (6th Cir.), cert. denied, 474 U.S. 831 (1985).

As a general matter, a defendant who is convicted in Ohio of a criminal offense may attack his conviction by one of two avenues, direct appeal and collateral attack. Claims appearing on the face of the record must be raised on direct appeal, or they will be waived under Ohio's doctrine of *res judicata*. See *State v. Perry*, 10 Ohio St. 2d 175 (1967). Issues which must be raised in a post-conviction action pursuant to O.R.C. §2953.21 include claims which do not appear on the face of the record and claims of ineffective

assistance of trial counsel where the defendant was represented on direct appeal by the same attorney who represented him at trial. *State v. Cole*, 2 Ohio St. 3d 112 (1982). In 1992, a third procedure of review commonly employed by Ohio prisoners emerged. Claims of ineffective assistance of appellate counsel must be presented to the appellate court in a motion for delayed reconsideration pursuant to *State v. Murnahan*, 63 Ohio St. 3d 60 (1992) and Ohio R. App. P. 26(B).

In addition to raising each claim in the appropriate forum, a habeas litigant, in order to preserve his constitutional claims for habeas review, must present those claims all the way through the Ohio courts. Thus, the judgment of conviction on direct appeal and any adverse decision rendered by the trial court in post-conviction, must be appealed to both the Ohio Court of Appeals and the Supreme Court of Ohio.

Respondent asserts that petitioner's ineffective assistance of counsel claim relating to his counsel's failure to file a notice of alibi has been procedurally defaulted. Petitioner did raise this claim or direct appeal, however, the court of appeals indicated that this claim was not properly before the court, and should be raised in a post-conviction petition.

> In his third claim, defendant maintains that counsel were ineffective for not timely filing defendant's notice of alibi. As noted, counsel did clearly indicate that they were aware of the alibi witnesses before the disclosure deadline set forth in Crim.R. 12.1; however, the record contains no explanation of the reason behind the late disclosure. For example, the record does not

> disclose whether trial counsel failed to investigate or to interview defendant's alleged alibi witnesses. As a result, we are unable to reach a determination as to whether the delay was the result of trial strategy or was due to counsel's ineffectiveness as alleged. As the reason for the late disclosure is not a part of the record before this court, defendant must pursue his claim of ineffective assistance based upon the late disclosure by way of a motion for post-conviction relief.

State v. Clinkscale, (December 23, 1999), Franklin App. No. 98AP_1586, 2000 WL 775607, unreported; Exhibit O to *Answer/Return of Writ*. Respondent argues that because petitioner failed to pursue a post-conviction action challenging the effectiveness of counsel for failing to file a notice of alibi, his claim is procedurally defaulted. However, this court does not agree.

Initially, this court determines that there is a procedural rule with which petitioner failed to comply. O.R.C. §2953.21 requires that a post-conviction petition be field with 180 days from the date the transcript is filed with the court of appeals. By failing to file any post-conviction petition, petitioner failed to comply with this rule.

This Court must determine if the state court actually enforced the procedural bar. Since petitioner did not actually file a post-conviction petition, the state courts did not enforce a procedural bar, and it is not entirely clear that petitioner is barred from pursuing post-conviction relief. Although O.R.C. §2953.21 requires that a post-conviction petition be filed within 180 days, O.R.C. §2953.23 allows a trial court to consider an untimely petition in certain circumstances:

> (A) . . . a court may not entertain [an untimely] petition . . . or a second petition or successive petitions for similar relief on behalf of a petitioner unless both of the following apply:
>
> (1) Either of the following applies:
>
> (a) The petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must relay to present the claim for relief [or]
>
> (b) Subsequent to the period prescribed in division (A) (2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right [and]
>
> (2) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

O.R.C. §2953,23. Thus, Ohio law does not clearly foreclose consideration of a post-conviction petition. Although such a petition would be untimely, the trial court could choose to

entertain it. Petitioner still has a remedy in state court if he can file a post-conviction action to assert this claim. Although it is unlikely that petitioner could assert his claims, this Court will not enforce a procedural bar that was not actually enforced by the state courts.[2]

However, pursuant to 28 U.S.C. §2254(b) (2), [a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." Thus, because it appears a remote possibility that the state courts would consider the merits of petitioner's claim if an untimely post-conviction action was pursued, and because it appears that the statute of limitations will have expired, should petitioner attempt to file a habeas corpus petition after an unsuccessful state post-conviction action regarding his claim, that counsel was ineffective for filing to file a notice of alibi.

The right to counsel guaranteed by the Sixth Amendment is the right to effective assistance of counsel.

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[2] Petitioner argues that he is not required to pursue post-conviction relief because he was represented by different counsel at trial and subsequently on appeal, and his claim that counsel ineffective for failing to file a notice of alibi does not rely on evidence outside the record and was properly presented on direct appeal. The Ohio court of appeals stated in petitioner's direct appeal that this claim should be raised in a post-conviction petition. This court will not second guess the state court of appeal's decision that petitioner must pursue this claim in a post-conviction petition.

McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). The standard for reviewing a claim of ineffective assistance of counsel is twofold:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must who that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); see also, *Blackburn v. Foltz*, 828 F.2d 1177 (6th Cir. 1987). "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689.

Petitioner first asserts counsel's ineffectiveness as a result of his failure to file a notice of alibi within the time period provided in Ohio Crim.R. 12.1. Petitioner asserts that he intended to offer an alibi defense at trial. The giving of advance notice prior to trial is governed by Ohio Crim.R. 12.1, which requires that a notice of alibi be filed at least seven days prior to trial. Counsel failed to timely file a

notice of alibi, and the trial court reused to permit petitioner's alibi witnesses, Bryan Fortner, Rhonda Clark and Arthur Clinkscale, to testify.

This Court cannot conclude that counsel was ineffective when counsel failed to file a notice of alibi. A claim of ineffective assistance of counsel waives the attorney-client privilege with respect to the issues raised in the petition. However, neither trial counsel has submitted an affidavit in connection with this proceeding. Counsel did submit affidavits in connection with petitioner's motion for a new trial. *See Exhibit S to Answer/Return of Writ.* However, there has been no information provided concerning when counsel learned of petitioner's alibi defense. In an affidavit attached to petitioner's motion for a new trail, counsel J. Tullis Rogers stated:

> 2. At some point in the interview process the defendant advised us that he was in bed with his girlfriend at the time of the murder of Kenneth Coleman.
>
> 3. Both Mr. Benton and I have heard the alibi of "I was in bed with my girlfriend at the time of the crime" dozens of times.
>
> 4. We ultimately requested our investigator to make every attempt to obtain confirmation of the defendant's alibi.
>
> 5. The defense team made a strategic decision not to file a Notice of Alibi until we were sure that we could back it up with credible witnesses and corroboration.

Affidavit of J. Tullis Rogers, ¶¶ 2-5. Short of indicting that an investigator was hired, neither of petitioner's attorneys identified any independent efforts to verify petitioner's alibi defense, or if counsel ever even spoke with petitioner's potential alibi witnesses. Neither counsel or petitioner state any details concerning discussions regarding the alibi defense. The record fails to establish when counsel had sufficient information to raise the alibi defense, although a Notice of Alibi, was, in fact, filed on October 6, 1998. Accordingly, absent evidence to the contrary, this Court cannot find fault with counsel's strategic decision not to file a notice of alibi until it could be supported with credible witnesses and corroborating evidence. *Strickland*, 466 U.S. at 687.

However, even if counsel was ineffective for failing to file a notice of alibi, petitioner must still demonstrate prejudice as a result of counsel's actions. To determine if petitioner suffered prejudice, this Court must review the evidence that was presented to the jury. Here, there as direct evidence linking petitioner to the crime. During her trial testimony, Todne Williams identified petitioner as her attacker. She testified she heard a gunshot and that petitioner appeared in her room only seconds later holding a gun. Transcript, p. 418. She further testified that she struggled with petitioner in the hallway and following the struggle petitioner shot her three times. Transcript, pp. 421-22. Her testimony also indicated that she had known petitioner for some time because he as a close friend of her husband and had been to her house numerous times. Transcript, pp. 403-04. This testimony, if credited by the jury, as it apparently was, constitutes sufficient evidence to sustain petitioner's conviction.

Petitioner wished to offer the testimony of three alibi witnesses, Bryan Fortner, Rhonda Clark and Arthur Clinkscale. However, petitioner has not provided this Court with an affidavit concerning their proposed testimony, nor has petitioner provided any documentation that these witnesses were willing to testify at his trial. Nonetheless, petitioner asserts that these witnesses would have testified that he was back in Youngstown, Ohio, when the shooting took place. Petitioner asserts that he arrived back in Youngstown, Ohio, when the shooting took place. Petitioner asserts that he arrived back in Youngstown on the afternoon of September 7, 1997. Transcript, p. 848. Petitioner states that he went to the house of his friend, Bryan Fortner. *Id.*, at 849. Petitioner indicates that he remained at his friend's home and watched a football game that evening. *Id.*, at 851. Petitioner indicated that he saw his father when he returned home. *Id.*, at 852.

Based upon the evidence presented at trial this Court concludes that a reasonable probability does not exist that absent trial counsel's errors the result of the proceedings would have been different. Here, Todne Williams' testimony identified petitioner as the shooter. Petitioner did have the opportunity to present his alibi to the jury when he testified at trial. As petitioner correctly indicates a critical element of this case involved his credibility of Todne Williams. However, even if petitioner had presented the testimony of his alibi witnesses, this Court is not convicted that a reasonable probability exists that the result of the proceedings would have been different.

Petitioner next argues that counsel failed to provide effective representation when he failed to object to testimony from a homicide detective that two firearms were seized

from his home in Youngstown, Ohio. Counsel also questioned petitioner concerning the firearm that was seized in his vehicle upon his arrest for violating conditions of his bond.

In analyzing this claim the state court of appeals stated:

> In this case, defendant took the witness stand and testified in his own defense. In the course of doing so, defendant was forthcoming about the details of his arrest and subsequent traffic stop. Given the fact that defendant testified and was thereby subject to examination by the prosecution, it would seem prudent trial strategy to directly and openly address the fact that handguns were confiscated from his possession in order to dispel or prevent the prejudicial impact which would occur if that information were elicited on cross-examination. Additionally, part of the defense strategy in this case was geared toward demonstrating the violent nature of Coleman and his associates, and that defendant had armed himself against possible retaliation by Coleman's friends. Significantly, counsel clearly demonstrated that none of the weapons found in the defendant's home or vehicle fired the shots which

> killed Coleman and injured Williams. Moreover, defendant testified that he feared retaliation from Coleman's associates.

State v. Clinkscale, (December 23, 1999), Franklin App. No. 98AP-1586, 2000 WL 775607, unreported; Exhibit O to *Answer/Return of Writ*. This Court does not disagree with the finding of the state court that counsel's strategy of dealing openly with the fact that guns were found in petitioner's possession was a sound trial strategy. We again repeat the court's finding in *Strickland* that "there are countless ways to provide effective assistance in any given case." *Strickland*, 466 U.S. at 689. Given the potentially prejudicial impact of disclosure of petitioner's possession of firearms on cross-examination, counsel's openly discussing this fact appears to be a reasonable trial strategy. Accordingly, petitioner is not entitled to relief on this basis.

Petitioner argues that counsel's failure to object to prosecutorial misconduct resulting from misleading statements in the prosecutor's closing argument constituted ineffective representation. Before assessing whether trial counsel was ineffective for failing to object to the prosecutor's actions, this Court must first determine whether the prosecutor committed misconduct. See *Washington v. Hofbauer*, 228 F.3d 689, 699 (6th Cir. 2000) (citations omitted).

For prosecutorial misconduct to rise to the level of a constitutional violation, a court must determine that the prosecutor's statements "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Hill v. Brigano*, 199 F.3d 833, 847 (6th Cir. 1999), cert. denied, 529 U.S. 1134 (2000) (quoting *Donnelly v.*

DeChristoforo, 416 U.S. 637, 643 (1974)); see also *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). When analyzing a claim of prosecutorial misconduct, the Sixth Circuit requires a district court to initially decide whether the challenged statements were improper. *Boyle v. Million*, 2001 F.3d 711, 717 (6th cir. 2000). If improper, the district court next examines whether the statements were so flagrant as to constitute a denial of due process and thereby warrant the granting of a writ. *Id.* To determine flagrancy the court must consider: '1) whether the statements tended to mislead the jury or prejudice the defendant; 2) whether the statements were isolated or among a series of improper statements; 3) whether the statements were deliberately or accidentally before the jury; and 4) the total strength of the evidence against the accused.' " *Id.* (quoting *United States v. Francis*, 170 F.3d 546, 549-50 (6th Cir. 1999)see also *Hill*, 199 F.3d at 847; *Angel v. Overberg*, 682 F.2d 605, 608 (6th Cir. 1982).

During closing argument the prosecutor stated:

> You heard the defense cross-examine detectives and fingerprint people, the latent lift people that there were prints of value that they didn't check Did you specifically check Pete Davis' of G-man's? Came in here trying to insinuate Pete David and G-man were in there, that they perhaps killed him.
>
> You heard the latent lift examiner testify about a machine called AFIS. It's an automated fingerprint system. And that machine, she said people in Franklin County, Pete Davis and G-man are from, G-money are from, takes all the prints of all those people in that computer in Franklin County and runs

> them automatically. Nothing hit. Pete Davis' prints didn't come up and G-man's didn't come up. G-money's prints didn't come up. So through AFIS their prints were crossed and they didn't' come up.

Transcript, pp. 960-61. Although the prosecutor made these statements, the record in fact reflects that the investigating detective did not ask the fingerprint examiner to compare the latent prints from the crime scene against the actual fingerprints of Pete Davis and G-money. Transcript, p. 533. Misrepresenting facts in evidence can amount to substantial error because doing so "may profoundly impress a jury and may have a significant impact on the jury's deliberations." *Donnelly v. DeChristoforo*, 416 U.S. 637, 646 (1974).

Considering the four factors stated in *Boyle*, this Court does not believe that the statements were so flagrant as to constitute a denial of due process. Although the statements were misleading, the record reflects that the statements were not part of a series of improper remarks. There is no evidence to suggest that the prosecutor deliberately sought to misstate the evidence. Finally, the primary evidence against petitioner was the testimony of Todne Williams, and not that of the fingerprint examiner. Accordingly, petitioner has not established prosecutorial misconduct that resulted in a denial of due process, nor has petitioner shown that had trial counsel objected to the prosecutor's statements, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

In petitioner's final argument, he asserts that counsel was ineffective when he failed to object to hearsay testimony which allowed Todne Williams' identification of petitioner to seem more credible. Petitioner also alleges that there was

hearsay evidence that the Youngstown Police Department identified Jerry Woods as one of petitioner's known associates. Transcript, pp. 697-98.

Petitioner argues that counsel was ineffective for failing to object to the following hearsay testimony:

> Q. Did you eventually - - did the police eventually call Virginia [Coleman]?
>
> A. Yeah, eventually, because I had to give them the number.
>
> Q. Where did you call from?
>
> A. The hospital.
>
> Q. Did the police call or did you call?
>
> A. I think the police called. I gave them the number and it took awhile for me to remember the number.
>
> Q. Were you there when the police called?
>
> A. Yes.
>
> Q. Were they able to talk to her?
>
> A. Yes.
>
> Q. What was the name they got?
>
> A. David Clinkscale.

Transcript, p. 446.

Q. [to decedent's mother Virginia Clinkscale] How did you receive - - how were you made aware of your son's death?

A. A telephone call.

Q. Who did you receive the telephone call from?

A. My daughter-in-law Todne.

. . .

Q. Did she say anything else?

A. . . . She said you know mom, Virginia, you know who did it. I said, you know who did it? And she said yes, because he lives in Youngstown it was his friend. She said, you know him, you know him. She said they call him Silk. I said, Silk? She said, yes Miss Virginia, David, she said, you know him, you know him from Youngstown. Ken told me you know him. And I said, David. And I repeated it. And then I just broke down and started crying.

. . .

Q. You indicated that at some point after the conversation with your daughter-in-law Todne, you had a conversation with your daughter.

A. Yes.

Q. First of all, what is your daughter's name?

A. Kimberly.

. . .

Q. At some point during the conversation with your daughter Kimberly, approximately 50 minutes after the phone conversation with Todne, did you have or did you realize or come to know the person Todne was talking about?

A. Yes.

Q. Can you explain the context within which that came about, by that realization.

A. When I told my daughter what had happened to her brother, she fell to the kitchen floor and I tried to lift her up and we embraced. And she said, mommy, what happened? And I said Todne said David killed Kenny. I said, they call him Silk. And she looked at me and said, Silk? She said, David? She said, Ma, David Clinkscale, they call him Silk.

. . .

Transcript pp. 496-98.

Q. [Detective Robert Viduja] . . . Tell us where you started.

A. Well, at the beginning we didn't know who the suspect was. We spoke with Todne Williams who was the living victim out of this.

. . .

Q. Did you attempt to get an identification in terms of whether or not she would be able to tell you who the assailants or suspects were?

A. Yes.

Q. Were you able to obtain a name?

A. She gave me the first name of David as one of the suspects, and she said he went by the nickname of Silk or Silky.

. . .

Q. Did she [Todne Williams] assist you any further in attempting to pin down this person Silk and/or David's last name?

A. Yes. She told me Kenneth Coleman's mother would know the identity of the suspect . . . .

Q. As a result of that information what did you do?

A. I called Virginia Coleman who was Kenneth Coleman's mother and asked her about David.

Q. As a result of that conversation were you able to determine a last name.

A. Yes. At that time Virginia Coleman stated David's full name is David Clinkscale and he's a good friend of Kenneth Coleman's.

Transcript, pp. 692-94.

Petitioner also argues that his counsel was ineffective for his failure to object to hearsay testimony identifying him as a known associate of Jerome Woods.

Q. What did you do as a result of compiling that information?

A. Youngstown Police Department quoted several pictures of known associates of David Clinkscale, and I put those pictures in our computer system, compiled photo arrays up.

. . .

Q. Jerome Woods?

A. Yes, W-o-o-d-s.

Q. In your investigation had the name Jerome Woods or "Woods" come up?

A. Pete Davis mentioned it during his interview, and it was one of the photographs sent out by the Youngstown Police Department as a known associate of David Clinkscale.

Transcript, pp. 697-98.

Petitioner cannot show, to a degree sufficient to undermine confidence in the outcome of his trial, that he was prejudiced by the failure of his trial counsel to object to these statements. Petitioner himself testified that he had known the victim's family in Youngstown. Transcript pp. 814-8818. Further, this Court is not convinced that testimony concerning petitioner's association with Jerome Woods would have altered the outcome of petitioner's trail. Accordingly, petitioner's ineffective assistance of counsel claim must be denied.

VI. Motion to Discharge Counsel.

In his final claim for relief, petitioner argues that he was denied the effective assistance of counsel when the trial court refused to allow petitioner to discharge counsel for failing to file a notice of alibi. The Sixth Amendment right to counsel entitles a defendant to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 686 (1984). "The right to counsel of choice, unlike the right to counsel, . . . is not absolute. An indigent defendant has no right to have a particular attorney represent him and therefore must demonstrate 'good cause' to warrant substitution of counsel." *United States v. Iles*, 906 F.2d 1122, 1130 (6th Cir. 1990) (citations omitted) (footnote omitted). In determining whether "good cause" exists, the trial court must balance the accused's right to select his own counsel against the public interest in prompt and efficient administration of justice. *Wilson v. Mintzes*, 761 F.2d 275, 280 (6th Cir. 1985). A motion to substitute counsel is directed to the sound discretion of the trial judge and will be revered only for an abuse of discretion." *Id.* at 281 (citations omitted).

In reviewing whether a court abused its discretion in denying a defendant's motion to substitute counsel, appellate courts generally consider the timeliness of the motion; the adequacy of the court's inquiry into the defendant's complaint; and whether the conflict between the attorney and client was so great that it resulted in a total lack of communication preventing an adequate defense. *Iles*, 906 F.2d at 1130 n. 8. (citations omitted).

Here immediately following the trial court's decision to exclude petitioner's alibi witnesses, petitioner addressed the court.

> DEFENDANT: Yes, Sir, Your Honor. I, David Clinkscale, feel that I have not been properly represented and I wish to have new counsel if that's possible.
>
> . . .
>
> DEFENDANT: . . . I'm questioning that my witnesses and the preparation of my case was not properly submitted at the right time. And I feel that being that it was not presented at the right time, that I should be able to be allowed to get proper counsel that can get all my paperwork and all the things that my defense should be properly stated.

Transcript, pp. 70, 73.

This court would first note that petitioner's requests for a new counsel were not timely. His request occurred after the trial had commenced. Although the court did not delve extensively into petitioner's reasons for the request to

substitute counsel, it is readily apparent that petitioner's request was motivated by the trial court's decision to exclude his alibi witnesses. The conflict between counsel and petitioner did not result from a lack of communication, but from petitioner's unhappiness with the trial court's evidentiary ruling concerning his alibi witnesses. While the trial judge should have given petitioner more opportunity to express the reasons for his displeasure with appointed counsel, and should have provided a fuller rationale for rejecting petitioner's requests, [3] this Court fails to find constitutional error under the circumstances. The Sixth Amendment simply does not guarantee "a 'meaningful relationship' between an accused and his counsel." *Morris v. Slappy*, 461 U.S. 1, 14 (1983).

VII. Recommendation.

Based upon the foregoing, the Magistrate Judge **RECOMMENDS** that the petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 be **DENIED** and this case be **DISMISSED**.

If any party objects to this *Report and Recommendation* that party may, within ten days, file and serve on all parties written objections to those specific portions to which objection is made, together with supporting authority for the objection(s). A judge of this Court shall make a *de novo* determination of those portions of the report to which objection is made. On proper objection, a judge of this Court may accept, reject, or

---

[3] The trial court cited counsel's background and experience as a factor in refusing to appoint new counsel. Transcript, pp. 70-73.

modify, in whole or in part, the findings or recommendations made herein, receive further evidence or may recommit the matter to the Magistrate Judge with instructions. 28 U.S.C. §636 (b) (1).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to *de novo* review of the *Report and Recommendation* and also operate as a waiver of the right to appeal the decision of the District judge adopting the *Report and Recommendation*. See *Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

/s/ Mark R. Abel
Mark R. Abel
United States Magistrate Judge

APPENDIX D

No. 02-4219

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DAVID B. CLINKSCALE,
Petitioner-Appellant,
v. [filed 9-17-04]

HAROLD E. CARTER, WARDEN,
Respondent-Appellee.

BEFORE: MARTIN and MOORE, Circuit Judges; and MCKEAGUE,* District Judge.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active** judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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* Hon. David W. McKeague, United States District Judge for the Western District of Michigan, sitting by designation.

** Judge Cook recused herself from participation in this ruling.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Entered by order of the court

/s/ Leonard-Green
Leonard Green, Clerk

Opposition Brief Unavailable for Filming at this Time

(3)

Supreme Court, U.S.
FILED
JAN 27 2005
OFFICE OF THE CLERK

No. 04-792

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2004

HAROLD E. CARTER, WARDEN
Petitioner,

-vs-

DAVID B. CLINKSCALE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state criminal defendant exhausts a claim of trial counsel ineffectiveness when he raises that claim in his direct state appeal but the state appellate court, consistent with this Court's reasoning in *Massaro v. United States*, 538 U.S. 500 (2003), declines to rule on the claim because the appellate record is inadequate to allow a ruling on that claim.

2. Whether the state courts have sufficiently complied with the clear-and-express statement rule set forth in *Harris v. Reed*, 489 U.S. 255 (1989), when a state trial court denies a motion to excuse the procedural default, when the state appellate court affirms that denial, and when the federal appellate court concedes that the state courts did not reach the merits of the federal claim.

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ARGUMENT

I. Raising a claim of trial counsel ineffectiveness on direct appeal cannot be deemed "exhaustion of state remedies" for federal habeas corpus purposes when the state appellate court declines to rule on that claim due to an inadequate appellate record.

II. When a state trial court enforces a state procedural bar, when a state appellate court affirms the trial court's order enforcing that bar, and when the state courts do not reach the merits of the federal claim, then the state courts have sufficiently complied with the clear-and-express statement rule of *Harris v. Reed*, 489 U.S. 255 (1989).

Both questions presented still warrant review. In response to Clinkscale's brief in opposition, petitioner adds the following regarding the first question presented.

A.

Clinkscale asserts that the direct appeal record *was* sufficient to allow the state appeals court to rule upon the alibi/ineffectiveness issue. However, this fact-bound response implicitly concedes a key point. Clinkscale implicitly concedes that it is important whether the direct appeal record was adequate to allow the state appeals court to address the alibi/ineffectiveness claim.

The Sixth Circuit majority engaged in no such analysis of this specific appellate record to decide whether the appellate record was adequate to address the alibi/ineffectiveness claim. Indeed, the Sixth Circuit majority implicitly decided that the appellate record had *not* been adequate, since it relied heavily on post-appeal affidavits and on a defense investigator's report in deciding the merits. None of these materials had been available to the state appellate court on direct appeal. Instead of making a careful assessment of appellate-record adequacy, the Sixth Circuit majority blew right past the issue of adequacy.

even saying "there were no special limitations on the ability of the Ohio Court of Appeals to reach the merits of that claim." *Clinkscale v. Carter*, 375 F.3d 430, 440 (6th Cir. 2004).

Even Clinkscale apparently would concede that there *are* special limitations on a state appellate court's ability to address claims of trial counsel ineffectiveness. These limitations are tied to the adequacy of the appellate record. To "exhaust" an ineffectiveness claim on direct appeal, a defendant must base that claim on an appellate record that would allow the state appellate court to make a full ruling on the merits.

This Court can reverse on the ground that the Sixth Circuit majority missed an important required step in the exhaustion analysis. This Court then can remand for the Sixth Circuit to conduct the careful review of the state appellate record that it should have conducted in determining whether the state appellate record had been adequate to allow the state appellate court to rule on the alibi/ineffectiveness issue.

B.

Clinkscale claims that his raising of the alibi/ineffectiveness issue on direct appeal must be deemed sufficient to exhaust that issue in the Ohio courts because, if he had not raised the issue there, Ohio courts would have treated the issue as barred by *res judicata* in state post-conviction review. But the state-law *res judicata* issue raises the same key question as the exhaustion issue: was the appellate record sufficient to allow a ruling on the issue on direct appeal? *Res judicata* will apply to bar a trial counsel ineffectiveness claim on post-conviction review only if "said issue could fairly have

been determined [on direct appeal] without resort to evidence *dehors* the record * * *." *State v. Cole*, 2 Ohio St.3d 112, 443 N.E.2d 169 (1982) (syllabus); see also *State v. Cooperrider*, 4 Ohio St.3d 226, 228, 448 N.E.2d 452, 454 (1983) ("when the trial record does not contain sufficient evidence regarding the issue of competency of counsel, an evidentiary hearing is required to determine the allegation."; "This procedure is through the post-conviction remedies * * *.").

There is no absolute rule requiring that Ohio defendants raise alibi/ineffectiveness claims on direct appeal. The viability of such a claim on direct appeal depends on the adequacy of the appellate record. In a fair number of cases, including the leading case of *State v. Smith*, 17 Ohio St.3d 98, 477 N.E.2d 1128 (1985), Ohio courts have recognized that the alibi/ineffectiveness issue is raisable in post-conviction review. *State v. Pierce*, 127 Ohio App.3d 578, 585, 713 N.E.2d 498, 502 (1998) (defendant presenting evidence outside original trial court record; issue raisable in post-conviction review); *State v. Ward*, 85 Ohio App.3d 537, 541, 620 N.E.2d 168, 171 (1993) ("impossible" on direct appeal to determine issue); *State v. Schlee*, 1998 Ohio App. Lexis 6363, 1998 WL 964291 (1998) (*res judicata* did not bar post-conviction review).

The state-law *res judicata* issue should not deter this Court from granting certiorari. The issue of whether *res judicata* exists under Ohio law merely mimics the analysis that should occur under the exhaustion doctrine for habeas purposes. If the direct appeal record was adequate to allow review, then the direct appeal was the correct place to raise the alibi/ineffectiveness issue, and that issue would be deemed exhausted because it was fairly presented in the state courts. If the direct appeal record was inadequate, then no "fair

presentation" occurred on direct appeal, and the alibi/ineffectiveness claim would not have been barred by *res judicata* in Ohio post-conviction review. Under both the exhaustion doctrine and the state-law *res judicata* doctrine, the adequacy of the appellate record controls, but the Sixth Circuit majority simply missed that important step in the analysis.

C.

Clinkscale's arguments on appellate-record adequacy lack merit for other reasons. Based on Ohio cases, including *State v. Smith*, *supra*, Clinkscale tries to make appellate-record adequacy turn on the issue of counsel's knowledge. According to Clinkscale, if the record does not include information that counsel had knowledge of the alibi witnesses, then direct appeal review will be inappropriate and post-conviction litigation will be allowed. See Brief in Opposition, at 6 & n. 3. But if the appellate record shows knowledge on counsel's part, then Clinkscale contends that the appellate court can find that counsel was ineffective.

This oversimplified analysis does not withstand scrutiny, including the flawed citation to *Smith*. In *Smith*, the trial court had excluded the alibi evidence, and the defense claimed trial counsel ineffectiveness on direct appeal. The court rejected the notion that the failure to file a notice of alibi constitutes *per se* ineffectiveness. The court also found indications that "counsel's noncompliance was an intended, self-serving trial tactic" and that "there is some indicia of proof that the alibi evidence was withheld from the prosecution in bad faith, as a planned trial tactic." 17 Ohio St.3d at 101, 477 N.E.2d at 1131.

The court also discussed the possibility that the criminal defendant himself may have approved this planned tactic:

> Counsel is required to consult with his client on important trial decisions. The record is devoid of any suggestion that counsel failed to communicate this tactic to the appellee. Thus, we assume that the appellee chose to disregard the notice-of-alibi rule, having the potential concomitant effect of depriving the state of a fair trial. * * *

Id. at 101 n. 1, 477 N.E.2d at 1131 n. 1. Despite these repeated references to intent, planning, and bad faith, the Ohio Supreme Court concluded that the alibi/ineffectiveness issue would be raisable in post-conviction review. *Id.* ("appellee is entitled to pursue the matter by means of postconviction relief").

As in *Smith*, indicia of knowledge and bad faith here raise more uncertainties about what occurred. Defense counsel here had ample opportunity to meet with the defendant and therefore presumably knew of the "alibi." In the words of the trial court, the "alibi" was "unsophisticated," but the simple nature of the "alibi" naturally begged the question of why counsel would have failed to file the simple alibi notice. Clinkscale's trial counsel claimed in the trial court that the notice was delayed because "we did not have verification from the investigator until the very last moment." Trial counsel did not say what factors prompted the perceived need for "verification."

Adding to the uncertainty was the Ohio trial court's conclusion that bad faith likely prompted the late notice:

> I think we do have bad faith here in the sense that I have been offered no reason whatsoever as to why this alibi could not have been timely filed. Absolutely none. The defense's only response is that the investigator just verified it a couple days ago after trial started. I don't accept that as a valid reason because the alibi would be very simple to verify * * *.

The trial court's concerns about bad faith were not far fetched. As this Court has stated in the context of defense discovery violations:

> One of the purposes of the discovery rule itself is to minimize the risk that fabricated testimony will be believed. Defendants who are willing to fabricate a defense may also be willing to fabricate excuses for failing to comply with a discovery requirement. The risk of a contempt violation may seem trivial to a defendant facing the threat of imprisonment for a term of years. A dishonest client can mislead an honest attorney, and there are occasions when an attorney assumes that the duty of loyalty to the client outweighs elementary obligations to the court.

Taylor v. Illinois, 484 U.S. 400, 413-14 (1988). It is "reasonable to presume that there is something suspect about a defense witness who is not identified until after the 11th hour has passed." *Id.* at 414. Defense discovery violations are sometimes "willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence * * *." *Id.* at 415.

On the then-extant appellate record, the Ohio Court of Appeals could not be certain what had happened. Counsel's proffered "verification" excuse was suspect, and the excuse raised its own questions about what had prompted the need for "verification." Counsel did not even provide an exact date as to when Clinkscale had given the attorneys information about the "alibi," only saying at one point that the date of disclosure was "not * * * yesterday." In large measure, counsel's statements were cryptic on the "alibi" issue and coy about what prompted the late filing of the notice of alibi.

Moreover, given the indications of "bad faith," the concerns raised in *Smith* naturally arose. The Ohio Court of Appeals in fact quoted from *Smith* extensively, including the language of *Smith* indicating that the criminal defendant may have approved of the late-notice strategy. The appellate court quoted from *Smith* that the issue was a matter for post-conviction proceedings. *State v. Clinkscale*, 1999 Ohio App. Lexis 6453, *14-20, 2000 WL 775607 (1999).

The appellate record was uncertain in other respects as well. While the untimely notice of alibi set forth that Clinkscale had been present at the home of Bryan Fortner and then at the home of his parents, the notice was conclusory as to how Fortner, Rhonda Clark, and Arthur Clinkscale would support the alibi, since the notice only said that they would "substantiate[]" the alibi. Since no detailed proffer was made of their testimony, the appellate court would have been unable to ascertain how strongly or weakly they would "substantiate" the alibi that respondent Clinkscale testified to at trial. While Clinkscale notes that the defense investigator's report had been provided to the prosecution, the report was not proffered to the

trial court and therefore was not available in the appellate record. As a result, the appellate court would not have been able to assess questions of counsel competence or prejudice.

In the final analysis, the appellate court had before it coyly-worded statements that disclosed little detail about how the "alibi" witnesses would testify or why the alibi had been withheld. With this much uncertainty, and with the danger that the defense had engaged in a bad-faith effort to sandbag the prosecution (with or without Clinkscale's consent), see *Smith*, and with the cloak of secrecy afforded the defense by the attorney-client privilege, see *Taylor*, 484 U.S. at 418, the Ohio Court of Appeals acted properly in concluding that it could not rule upon the alibi ineffectiveness issue on direct appeal.

D.

Clinkscale correctly asserts that *Massaro* is not a constitutionally-mandated decision. *Massaro* holds that a federal criminal defendant need not ever raise a claim of trial counsel ineffectiveness on direct appeal in order to preserve it for post-conviction review under 28 U.S.C. § 2255. This categorical holding is limited to federal prosecutions, and therefore Ohio is not bound to adopt a similar rule. Ohio can still require defendants in some cases to raise the issue of trial counsel ineffectiveness on direct appeal because in some cases the appellate record will be adequate to address such issues.

The question presented here is different. Although Ohio requires some defendants to raise the ineffectiveness claim on direct appeal when the appellate record would allow a fair determination, Ohio is also allowed to require other

criminal defendants to proceed through post-conviction remedies when the direct appeal record is inadequate.

Consistent with the reasoning of *Massaro*, the Ohio Court of Appeals concluded that it could not rule on the alibi/ineffectiveness claim on direct appeal. Ohio need not adopt *Massaro*'s categorical holding *in toto* to see that *Massaro*'s discussion of general unreviewability makes perfect sense in the large number of cases where the direct appeal record is inadequate to allow the appellate court to make a definitive ruling.

Clinkscale briefly refers to the fact that his time for seeking post-conviction relief had expired under Ohio law by the time the Ohio appellate court said he should proceed through post-conviction proceedings. But Clinkscale's failure to seek timely post-conviction relief does not detract from the fact that the direct appeal record had been inadequate. Clinkscale should have filed a timely post-conviction petition while the appeal was pending. He should have allowed for the distinct possibility that the appellate court would decline to rule. His failure to do so is his own procedural default.

E.

Despite the Sixth Circuit's efforts to contend that the warden failed to sufficiently argue lack of exhaustion, the fact remains that the issue was raised in the Sixth Circuit, and the Sixth Circuit correctly ruled that the issue had not been waived. Moreover, the only reason the warden did not claim lack of exhaustion in the district court was because the warden was urging the issue of procedural default. When a claim is

procedurally defaulted, it is "exhausted" because it is no longer raisable in the state courts.

On the specific point of whether the alibi/ineffectiveness claim had been exhausted on direct appeal, the warden argued that "the Court of Appeals was correct when it determined that the claim was not properly presented in the direct appeal because the claim necessarily relied on evidence outside the record." See Answer/Return of Writ, at 18. The magistrate *agreed* with the warden on this specific point. See Report and Recommendation, at 25 n. 2. Even if the question of exhaustion could be waived, it was not waived here.

CONCLUSION

In light of the foregoing, petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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January 2005